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No. 2473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION STEAMSHIP COMPANY (a corporation), claimant of the American Steamship "Argyle", her engines, boilers, etc.,

Appellant,

vs.

KONSTANT LATZ,

Appellee.

BRIEF FOR THE GUALALA STEAMSHIP COMPANY.

IRA S. LILLICK,
L. A. REDMAN,
Proctors for The Gualala Steamship Company.

Filed this ..... *day of November, 1914.*

FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

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The statement of the case, as presented by appellant upon pages 1 to 5 of its opening brief contains upon page 3 a purported statement of the facts testified to by the witnesses for the "Argyll". This statement is, however, if not at variance with the testimony, at least silent as to several most important particulars which, considered in their relation to the other facts in the case, fully support the decision of the court below.

Counsel for appellant has omitted to state that, upon the trial, McAlpine, the third mate of the

"Argyll", and the officer in charge of her at the time of the collision testified (Ap. 53) that when the "Gualala" was first reported to him and he first saw her she was inside of a mile away and that when examined under oath before the U. S. Inspectors (Ap. 5-7) the same witness testified that when he first saw the "Gualala" she was three miles away.

From the statement of the "Argyll's" case by its counsel, the court would infer that, within the time it takes to write it, those on the "Argyll" first saw the range lights of the "Gualala", then her green light and that, shortly afterward, the "Gualala" blew a one blast passing signal, ported her helm, and turned sharply across the course of the "Argyll". As a matter of fact, McAlpine testified (Ap. 58) that it was from five to six minutes from the time the first saw the lights of the "Gualala" to the time of the impact between the two vessels; that (and the lower court so found) (Ap. 366) during this time, when the "Gualala" was almost dead ahead, this same officer in charge of the "Argyll" failed to notice any change in the lights of the approaching steamer, did not observe when, nor for how long, her green light and red light both showed, nor when her red light first came into view, did not see it at all until warned by her whistle (Ap. 65), and after first seeing her simply directed the man at the wheel of the "Argyll" "not to let her come any closer" (Ap. 79), and paid no further attention to

her until the one whistle from the "Gualala" called his attention to her again.

Another most significant fact, sufficient of itself to warrant an affirmance of the decree of the District Court, and not mentioned in appellant's statement of the case, *six minutes elapsed from the time the lookout reported the lights of the approaching "Gualala" until she blew the passing signal of one whistle* (Ap. 69).

We shall again advert to these facts in commenting upon others not referred to by appellant, but of the utmost importance in determining who was responsible for the collision.

It is claimed by appellant that the District Court in its opinion *impliedly* found that the version of the collision given by the officers and crew of the "Argyll" was the true one. We do not so read that opinion. The court stated that the testimony was so voluminous and conflicting that it could not find the requisite time to review it (Ap. 367).

Counsel for appellant, in this court, as they did in the District Court, base their defense upon a theory of "the conditions which must have brought about the collision". This theory of counsel is based, not upon the testimony of those who actually witnessed the collision, but upon an elaborate diagram drawn by an expert who was called upon in cross-examination, not to explain the collision but

to draw certain lines, courses and distances to prove counsel's *theory* about the collision to be correct.

This is a case in which we need neither elaborate diagrams, nor expert testimony, to fix the responsibility for those primary faults, which, in the language of the court in *Belden v. Chase,* 150 U. S. 674; 37 L. Ed. 1218, are themselves "sufficient to account for the disaster".

Almost the entire brief of the appellant is devoted to an attempt to "raise a doubt with regard to the management of the other vessel" (the "Gualala"), and no attempt is made to explain, or distinguish the facts as found by the opinion of the District Court, from which that court came to the conclusion that the "Argyll" was responsible for the collision. Yet, considering the testimony as a whole, counsel for the claimant was compelled to make this attempt "to raise a doubt with regard to the management of the "Gualala", for no justification can be offered for the conduct of McAlpine, the officer in charge of the "Argyll", and Hansen, her look out, during the few minutes before the collision—no explanation can be made which will excuse them for their almost criminal carelessness and neglect. Their "negligence sufficiently accounts for the disaster". Counsel for appellant is unable to justify it, and, in consequence, asks this court to reverse the decree of the lower court (based, as it is, upon the testimony as a whole, and the lower court's opportunity to observe the witnesses and note their

appearance and manner while testifying), and substitute for it a decision which would have to have for its foundation an elaborate theory supported only by the views of experts, instead of that of witnesses to the collision.

We think it proper at this point in our reply to refer to that well-established rule in admiralty, that the decision of the lower court, so far as it is based upon the facts, will not be reversed, or disturbed, unless it *clearly* appears that there was error. This rule has been followed by an unbroken line of authority in this and other circuits.

Whitney v. Olsen, 108 Fed. 292;
Alaska Packers' Ass'n v. Domenico, 117 Fed. 99 (9th Circuit opinion by Judge Ross);
Baker-Whiteley Coal Co. v. Neptune Nav. Co., 120 Fed. 247;
The Oscar B., 121 Fed. 978;
Paauhau Sugar Plantation Co. v. Palapala, 127 Fed. 920 (9th Circuit);
Coastwise Trans. Co. v. Baltimore Steam Packet Co., 148 Fed. 837;
The Phila. B. & W. R. Co. v. The Southern Trans. Co., 205 Fed. 732;
Davis v. Schwartz, 155 U. S. 631; 39 L. Ed. 289.

An examination of the opinion of the lower court (Ap. 367) shows how squarely the decree rests upon the facts in the case. The opinion consists wholly of findings of fact. Findings of fact from the tes-

timony offered by the respective parties in a case in which the court quite properly commented upon its conflicting character. All of the witnesses produced by appellant were examined in open court and the court had the opportunity to judge of the credibility of these witnesses from their manner while testifying and their demeanor while under cross-examination. From appellant's assignment of error it is apparent that this court is asked to set aside the decree of the lower court on the ground that the lower court incorrectly decided questions of fact depending upon the credibility of the witnesses who testified before him.

In a case of this character, Judge Goff, speaking for the Circuit Court of Appeals, in the case of *The E. Luckenbach,* 93 Fed. 841, said:

> "There is the conflict in the testimony usually found in cases of collision, the contending interests being diametrically opposite in their claims, as well as in the testimony their respective witnesses have given relative thereto, * * * the material witnesses on both sides testifying before the judge who decided the case below. Unless we find from the record that the decision is clearly against the evidence, we will not, as the questions of fact are to be ascertained from conflicting testimony—reverse the decree of the judge in whose presence the evidence was given, who observed the witnesses and noted their appearance and manner, and who was thereby aided in determining as to their credibility. The conduct of the witnesses when being examined, their demeanor under cross-examination, and their personal characteristics are material, and, unfortunately, can-

> not be carried into the record. Consequently, the rule prevails in cases like this that the decree of the trial judge will not be disturbed upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there is found to be a decided preponderance of evidence against the same."

This principle can be especially invoked in the present case, for the reason that all of the witnesses for the "Argyll" were examined in the presence of the District Judge and their testimony was not only full of contradictions, but at variance with that of each other and unsupported by the inherent probabilities of the case.

Much of the argument of counsel for the appellant is based upon the assumption that *three* facts (stated upon page 7 of their brief) are admitted. Other facts, fully as important, were admitted as true. A few of them are:

(1) The lights of the "Gualala" could have been seen from the "Argyll" before they actually were;

(2) The two side lights of the "Gualala" could have been seen from the "Argyll" long before they were;

(3) Neither lookout nor mate upon the "Argyll" observed the green light on the "Gualala" disappear and the red light remain in sight;

(4) McAlpine first saw the "Gualala's" red light when her one whistle called his attention to her again;

(5) McAlpine did not know how long this red light had been observable from the "Argyll" before he looked up when he heard the one blast;

(6) After seeing the lights of the "Gualala" the course of the "Argyll" was changed to port;

(7) When the course of the "Argyll" was changed to port the man at the wheel was directed not to let the "Gualala" "come any closer";

(8) McAlpine admitted that it looked to him as if some entry had been made in the pilot house log of the "Argyll' in his watch, and it had been rubbed out;

(9) The "Argyll" neither slackened her speed nor reversed when the red light, together with the green light of the "Gualala", became visible, nor when the green light went out and the red light alone remained visible.

Conceding that all these facts are true, and they are all taken from the testimony of the witnesses produced by claimant, what becomes of appellant's elaborate argument based upon the diagram made by Captain Curtis under the skilful cross-examination of the astute counsel for appellant? We have from the statements of the witnesses produced by appellants a perfectly reasonable and logical explanation of how the collision occurred and an absolute demonstration of the faults committed by those in charge of the "Argyll". The salient facts which we have enumerated are of such a char-

acter as to fix upon the "Argyll" the sole responsibility for the collision.

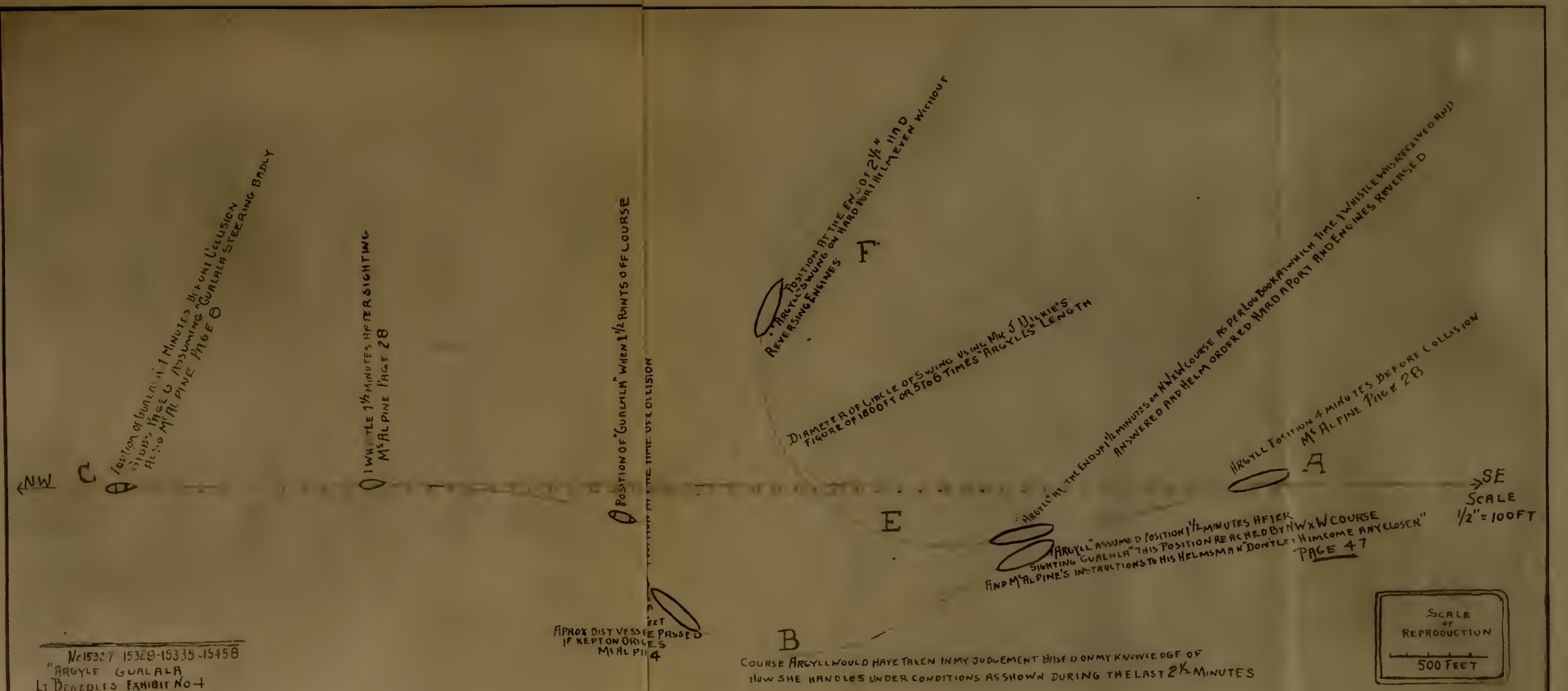
Counsel for the appellant base their argument that the "Gualala" was in fault upon the contention that the appellant has demonstrated that the vessels could not have come together at an angle of 30° from ahead when the "Gualala" was headed S. SW. if the vessels were approaching each other prior to the "Gualala's" first alteration of course so that the "Argyll" was one and a half points on the "Gualala's" port bow and showing her red light to the latter, while the "Gualala" was on a SE. course. The "demonstration" claimed by our adversaries, however, is a "demonstration" based upon the false premise that the "Argyll" at no time prior to the collision changed her course. The appellant cannot be allowed to disregard the order given by McAlpine to the man at the wheel, "Don't let him come any closer"; nor the telltale entry in the log book of the "Argyll", "Altered course ½ point to Port". The "demonstration" ignores these two fatal admissions. We think that there can be no question but that the "Argyll" from 2:59, when the lookout reported the lights of the "Gualala", gradually changed her course to port up to a few moments before the collision at 3:07, and then, too late, changed her course to starboard, covering as she did so a course approximately thus:

The diagram drawn to chart with accurate statement of time and distance, based upon the testimony, is given in "Libelant Beadle's Exhibit No. 4", (copy appended), to which we respectfully refer the court for an accurate estimate of the respective courses of the two vessels.

Even the expert witnesses relied upon by appellant had to admit, upon cross-examination, that, notwithstanding their answers to the involved hypothetical question asked them, in which appellant sought to show that the "Gualala" suddenly changed her course and ran across the bow of the "Argyll", that, if the "Argyll" *did* change her course first to port and then later to starboard that it was possible for her to have gone over a course which they described as a letter "S" (but which in reality would have been only a segment of the letter), which would have placed her directly in the course of the "Gualala" as described by her officers.

Curtis, chief officer of the "Argyll" (Ap. 148):

> "Q. But if during that swing, if such a swing was on and made by the 'Argyll', and the helm of the 'Argyll' had been suddenly put to port, she would have turned and met the other vessel head on, would she not?
>
> A. In time she would, yes.
>
> Q. And it depends altogether upon the time that elapsed between the various changes of her course?
>
> A. Most assuredly."



No 15327 15328-15335-15458
"Argyle Gualala
Lt Beadles Exhibit No 4
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Capt. Pillsbury (Ap. 163):

"Q. Starting with the position of the 'Gualala' a point and a half off the starboard bow of the 'Argyll', the officer in charge of the 'Argyll' making up his mind to keep the light in the same position now, and assuming also that the 'Gualala' commenced to change her course to starboard, would the 'Argyll' in order to keep that light in that same position not have changed her course to port?

A. Yes.

Q. She would have to change her course to port?

A. Yes.

Q. And if during the course of the maneuver and while the two vessels were approaching each other at the rate of 8 knots per hour, and the officer of the 'Argyll' suddenly realized the imminence of danger and changed his course from the port course to starboard, putting his wheel hard aport, it could have accounted for the position in which these two vessels struck each other, could it not?

A. If he had not gone too far."

Capt. Ferris (Ap. 180):

"Q. And you don't think it would make any difference whether the 'Gualala' was on the port or starboard side of the 'Argyll' during all of this maneuver as to whether or not the collision might have happened in the way it did?

A. If she were a point and a half on the bow and the 'Argyll' *had kept her course or put her helm to port* then the chance of collision as I see it was great, but if her helm had been hard to starboard then the chances were diminished greatly.

Mr. REDMAN. Q. You say hard to starboard?

A. Yes, sir.

Q. There is no evidence she put it hard to starboard.

A. I say assuming it was.

Q. Suppose it was not hard to starboard, suppose she was put one half point to port and then ran that way for 8 minutes?

A. The 'Gualala' would have hit the 'Argyll'.

Q. There would have been a collision then?

A. Undoubtedly."

Gibbs' explanation of the collision is criticized by appellant, and yet David W. Dickie, the expert of appellant, testified (Ap. 172):

"The angle which Mr. Gibbs gave and the time which Mr. Gibbs gave and the speed which he gave harmonized very closely, so closely that I assumed they were all correct in the laying down of Mr. Gibbs' courses of the 'Gualala'.

Q. The point I am seeking to bring out is this: leave out his conclusion that he had turned his vessel 6 points, did the other testimony given by him corroborate that conclusion?

A. Yes, sir."

In fact, Mr. Dickie went so far in his testimony as to state that Gibbs' times and his angles of courses as given agreed, and the only thing he was out in was the distance between the two vessels.

Estimates of distance at sea are always uncertain on account of the object under observation not being in such a position as to enable the observer to check the distance or compare it with the distance the object may be away from a known landmark. This is particularly so at night when the object observed is a light and the size and bril-

liancy of the light is not known. It seems to us that in checking up Gibbs' testimony it speaks well for its accuracy and reliability when the experts can find nothing to criticise in it but the distances given by him. In fact Mr. Dickie said (Ap. 170):

> "I am not criticising Mr. Gibbs because his judgment as to the distance away is probably an error. This diagram seems to indicate that the 'Argyll' was on the starboard bow of the 'Gualala' and not on the port bow as they testify. I came to the conclusion that that was probably accounted for by yawing of the 'Gualala' (the reporter wrote 'Argyll', but the witness meant 'Gualala') coming down the coast with a following sea."

This "yawing" of the "Gualala", referred to by Mr. Dickie, is the explanation of why Gibbs thought the "Argyll" on his port bow rather than on his starboard bow, but whether she was one and a half points on the port bow or one and a half points on the starboard bow, she was so nearly dead ahead that had McAlpine on the "Argyll" continued on his course, or directed his course to starboard, after receiving and answering the one blast from the "Gualala's" whistle, instead of ordering the man at the wheel of the "Argyll" not to "let him come any closer" there would have been no collision.

Appellant bases its contention that the "Gualala" was responsible for the collision very largely upon the diagram drawn by Captain Curtis while under cross-examination by appellant's counsel. A careful examination of the diagram shows that

Gibbs was mistaken about the distance the "Argyll" was away from him and mistaken, perhaps, about the fact that the "Argyll" was one and one-half points on the "Gualala's" port bow. But whether he was mistaken about the distance the two vessels were apart or not, there is no question but that the two vessels were in sight of each other at least five minutes before the collision. Gibbs' story (Ap. 262) is that he saw the red light of the "Argyll" about three minutes before the collision and then blew one blast of his whistle and about a minute and a half after seeing the red light and the two vessels had exchanged signals he saw the "Argyll's" green light and then he immediately stopped his engines and backed full-speed astern. It is from this simple statement of Gibbs' that counsel for claimant builds up the elaborate explanation of the diagram drawn under his direction to prove that Gibbs was mistaken—an explanation and a diagram that ignore entirely the first change to port upon the part of the "Argyll", as well as the possibility of the truth of the testimony of those witnesses who swore that they heard the Captain of the "Argyll" immediately after the collision admit that he had gone up to the bridge, having heard one whistle blown on the "Argyll", and on seeing a light ahead ordered the man at the wheel to put her over "hard a starboard".

The appellant, knowing how impossible it is to justify the conduct of those in charge of its own vessel, has "banked its all" upon the attempt to

discredit Gibbs by means of the diagram drawn by Captain Curtis. The attempt was not successful in the District Court, and we do not believe it will be here. We ask the court to read over the testimony of Gibbs. Every effort was made on cross-examination to shake his story and to force him into contradictions, but we submit that the record shows no deviation upon his part from the facts as he gave them before the Inspectors, as well as on direct examination. His testimony is entitled to full credit and bears all the hallmarks of truth. As Dickie said (Ap. 172):

> "The angle which Mr. Gibbs gave, and the time which Mr. Gibbs gave, and the speed which he gave, harmonized very closely, so closely that I assumed they were all correct in the laying down of Mr. Gibbs' courses of the 'Gualala.'"

We are content to rest our case upon the story told by Gibbs. The contrast between it and that of the thoroughly discredited McAlpine is so great that we desire to refer to the language in *The Eagle Wing,* 135 Fed. 826:

> "Where the testimony in behalf of vessels in collision is conflicting and uncertain as to what was done upon one vessel, and the testimony on behalf of the other vessel as to what was done is clear and positive, or where the testimony of one of the vessels comes from intelligent, experienced, and apparently reliable witnesses, and that of the other from ignorant, inexperienced, shiftless, and manifestly unreliable persons, the court in admiralty, as in all other classes of litigation, must take into account the existence of such conditions in fixing the responsibility for the collision."

The portion of appellant's brief under the heading "The Vessels Were Approaching Starboard to Starboard, and the Collision Was Caused by the 'Gualala' Porting", pages 28 to 31, is based mainly upon the testimony of McAlpine, Hansen and Torbjorsen, testimony which, where not totally unworthy of belief, fixes upon claimant the fault for the collision. On page 29 claimant, much to our surprise, refers to the testimony of Hansen, their lookout, that he "estimated the distance of the 'Gualala' away at the time he first saw her lights at about three or four ship lengths and at about three ship lengths when she blew one whistle" (Ap. 126-7). The pilot house log of the "Argyll" records: "2:59 lookout man reported green light on starboard bow 2 points. Altered course ½ point to port. *Received one whistle from vessel.* 3:05 reversed engines full astern. 3:07 collided with the 'Gualala'."

The vessels were each traveling at the rate of 8 knots an hour or at a combined rate of 1624 feet per minute, and yet we are asked to believe Hansen that when he first saw the lights of the "Gualala" she was three or four ship lengths away, and claimant bases a serious argument upon such a premise. This argument that the maneuvers of the "Argyll" were made necessary by the action of the "Gualala", and being "in extremis", are not of such a character as to show fault upon the part of those in charge of the "Argyll", totally ignores the entries in the logs of the "Argyll". What were those

in charge of the "Argyll" doing between 2:59, when they saw the "Gualala's" approaching lights and heard her one whistle and answered it, and 3:05 when they reversed the "Argyll's" engines? Between 2:59 and 3:05 the "Argyll" was proceeding full speed ahead and during that time running at the rate of 812 feet per minute. She had covered 4872 feet or approximately one mile of the distance between her and the approaching "Gualala". If when she exchanged whistles with the "Gualala" she had taken the action those whistles indicated and altered her course to starboard she would have passed the "Gualala" in safety and at such a distance that we would not now be before the court attempting to fix the blame for the disaster that occurred.

The case of *The Ping-On,* 11 Fed. 607, cited by appellant, arose out of a collision in the Yang-tse-Kiang River in China, and the court was called on to pass upon the responsibility for the collision in the channel. A point was made in the case that by custom in going up or down the river vessels kept respectively to the starboard side. The tug first sighted the "Ping-On" about 2 to 2½ points off her starboard bow. After proceeding some distance the vessels exchanged cross-signals and a collision occurred.

The court, in *The Roanoke,* 45 Fed. 905, held that a sailing vessel which changed her course when so near a steamer as to make it impossible for the steamer to avoid her was responsible for the col-

lision, but we fail to see how the case is in point here.

In *The Eagle Wing,* 135 Fed. 826, the vessel held responsible for the collision was in charge of an unlicensed officer and the fact was practically undenied that just prior to the collision the "Eagle Wing" suddenly changed her course without warning and ran into the other vessel.

The facts found by the court in *The Atlantic City* are sufficient to distinguish it from the case at bar: The "Sylvan Glen", going up the Delaware River, sighted the ferry boat "Atlantic City" coming out of her slip. The ferry boat came out and straightened away on her course about in the middle of the river showing her green light to the "Sylvan Glen". They each blew two blast whistles, although neither heard the other, and when about 300 feet apart the "Glen" suddenly ported her helm and ran across the bows of the "Atlantic City". Although the "Glen" claimed the other vessel had changed her course there was no evidence of it, other than that the "Glen" claimed to have heard a blast of one whistle. It was proven that this one blast came from another vessel. No change of course was indicated on the part of the "Atlantic City". The "Glen" was, of course, held responsible for the collision.

In *The Free State,* 91 U. S. 200; 23 L. Ed. 299, the court held that

> "if two ships, one of which is a sailing ship and the other a steamship, are proceeding in

> such direction as to involve risk of collision, the steamship shall keep out of the way of the sailing ship, which must hold its course and rely upon the steamship to avoid a collision."

The sailing ship altered its course, and for that plain violation of the rule was penalized.

The Manitoba, 122 U. S. 154; 30 L. Ed. 1095, seems to us to be an authority in point for the "Gualala" rather than the "Argyll". The court said (bottom of page 1099):

> "The Manitoba was in fault in not indicating her course, by her whistle, and in not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby."

Are not each of these faults those committed by the "Argyll"? She changed her course to port and kept on changing it for at least four minutes before the collision without indicating it to the "Gualala" by whistle; she did not slow up; she failed to reverse her engines until too late.

Counsel for appellant in commenting upon this case write:

> "Here, the 'Argyll', by porting, and immediately reversing, and indicating it by her whistles, took the very measures, for the want of which the 'Manitoba' was condemned."

We submit that this is *not* what the "Argyll" did. She *did* change her course to port. She *did not* blow two whistles, which indicate such a change. She *did not* "immediately reverse".

The pilot house log of the "Argyll" reads:

> "*2.59* Lookout man reported green light on starboard Bow 2 points. Altered course ½ point to Port. Received one whistle from vessel.
> *3.07* Collided with 'Gualala'."

The engine room log reads:

> "Astern full speed *3.06.*"

The "Argyll", from her own record made at the time, reversed her engines not more than *one* minute before the impact between the two vessels and had for seven minutes before the engines were reversed been running at full speed ahead.

The next case cited by appellant is that of *The Voorwaarts,* L. R. 5 A. C. 876; 4 Asp. M. C. 360; but in commenting upon it appellant again commits the error of stating that "the 'Argyll' did reverse at once". We have just cited their own testimony to prove she did not.

The Voorwaarts is cited in *Marsden on Collisions* in support of this text:

> "If a vessel by her own fault makes a collision so imminent that it cannot be avoided except by extraordinary skill, nerve, or exertion on the part of the other ship, and a collision occurs, it will be held to have been caused by the former, and she will be held for the entire loss."

This text is another way of stating the "primary fault" rule laid down in *Belden v. Chase,* 150 U. S. 674; 37 L. Ed. 1218, to which we shall refer later.

Appellant, although stating that the "Khedive" was held in fault, neglected to state that the reason the House of Lords found the captain of the "Khedive" at fault was because he elected to keep his engines going full speed ahead and because he did not stop and reverse.

In attempting to excuse Hansen for his dereliction of duty and his failure to see the lights of the "Gualala" until the vessels, as he put it, were three or four ship lengths away, appellant has referred to certain testimony as to atmospheric conditions. An examination of that testimony will show how little foundation there is for any claim that Hansen did not see the lights of the "Gualala" because of fog. The District Court specifically found (Ap. 367) that the collision occurred upon "a clear night, when the lights of each were easily discernible to the other while they were yet miles apart." There was no reason other than Hansen's neglect, why the lights of the "Gualala" were not more closely observed from the "Argyll". But what becomes of the admissions that the lights of the "Gualala" were seen on the "Argyll" at 2:59 and that the collision did not occur until 3:07 with the "Argyll" running full speed ahead from 2:59 to 3:06? The "fog" theory is a very thin veil to cast over the conduct of Hansen and McAlpine.

The attempt to excuse the failure of Hansen to report to the bridge when he saw both the side lights of the "Gualala" is equally futile. When counsel for claimant stated that Hansen was under

no obligation to report the change in the lights on the "Gualala" to McAlpine, on the bridge, because Hansen *knew* McAlpine must have known it from the whistle, counsel forgot that the lights on the "Gualala" had changed *before* the whistle. McAlpine testified that when he heard the one whistle from the "Gualala" he looked up and for the first time saw the red light (Ap. 65).

> "Q. Then it is a fact that the whistle on the 'Gualala' called your attention to it, and you looked and saw the red light. Is it not true that the whistle called your attention to it?
> A. Certainly, he brought my attention to it.
> Q. * * * You did not see it come into view, you heard the whistle, and then you looked up and you saw the red light?
> A. Yes, sir.
> Q. You do not know when that red light was first observed from the 'Argyll'?
> A. No, sir.
> The COURT. Q. That is so?
> A. Yes, sir."

Appellant states that "*if* Hansen had reported both lights, and then the red light alone, it would not have avoided the collision". We assert most confidently that it would have avoided the collision. It must be remembered that there is no record of *how long* the interval was between the time when from the "Argyll' the green light of the "Gualala" was visible *with* the red light, and the going out of the green light, and the whistle suddenly calling to McAlpine's attention the dangerous course he was upon and the chances he had taken. Even then believing, apparently, that there was no danger, he

answered the whistle and continued on full speed ahead.

Appellant assumes, quite properly, that we will attack the credibility of McAlpine. Justification, or attempted justification, of McAlpine is futile. With all of the ingenuity at the command of counsel for claimant, no explanation can be made which will suffice to pardon or excuse McAlpine for doing what he did do in causing the collision, and omitting to do what he might have done to obviate it.

The "in extremis" argument made by counsel for appellant (appellant's brief, p. 43) is conclusively disproved by the entries in the pilot house log book above quoted. According to these entries at *2:59 the "Gualala" was reported and blew one whistle. This one whistle was answered by the "Argyll", but she did not alter her course to starboard as she should have done, but continued on until, according to the log book, her engines were reversed at 3:05; the collision occurring at 3:07.* If these figures are correct, and certainly appellant is not in a position to dispute them, it clearly appears that the answering blast of appellant was *not* given "in extremis", *but at the time the "Gualala" was sighted, eight minutes before the collision.* These facts and figures completely dispose of appellant's whole contention on this point. Moreover, we have the admission of McAlpine himself (Ap. 56) that *the whistle of the "Gualala" was blown about a minute and a half after she was sighted.* Assuming this to be correct, although it is contradicted by the

entry in the log book, still *6½ minutes elapsed before the collision occurred, and 4½ minutes elapsed before the engines of the "Argyll" were reversed.*

The attempt of appellant to establish inefficiency and negligence on the part of the bridge officer and lookout on the "Gualala", by the statement that "If it be assumed, for the sake of argument, that the story of Gibbs, first officer of the 'Gualala', was correct", and by then reciting Gibbs' version of what was done upon the "Gualala", following it with the contention that Gibbs' statement proves to a demonstration that Gibbs was not maintaining the efficient watch required of a bridge officer, makes no allowance whatever for the fact that the "Gualala" did not have steam steering gear, but was the type of vessel that had a hand-wheel, which changed her course slowly (Ap. 39).

In making the argument referred to, appellant also fails to take into account the change of course to port upon the "Argyll" after the order of McAlpine to the man at the wheel, "Don't let him come any closer". The result of the two factors just mentioned was to keep the lights of the respective vessels upon practically the same angle and the same line of approach. The "Gualala" paid off slowly to her right, the starboard, and the man at the wheel on the "Argyll", obeying his instructions "not to let the 'Gualala' come any closer", paid off to her left, the port, until finally, seeing disaster impending, McAlpine, on the bridge of the

"Argyll", when too late, suddenly awakened to the danger and ordered his wheel hard a'port. Gibbs testified that he saw the range lights of the "Argyll" first and kept watching them to see if the "Argyll" was changing her course (Ap. 262), and, as he puts it (Ap. 263), "It did not look to me as though she had changed her course, but it appeared that she was not porting her helm at that time; it looked to me as if she had not ported her helm; it looked to me as though she was coming to the starboard". (Gibbs meant, of course, that the "Argyll" was coming to the starboard of the "Gualala", or in a direction to port upon the "Argyll", which is undoubtedly exactly what the "Argyll" did do, with the man at her wheel carrying out his instructions, "not to let the 'Gualala' come any closer".) As Comstedt, the lookout, put it (Ap. 356):

> "Well, after I reported her light, we was blowing one whistle, and the 'Argyll' she was answering us right off, and I could see her red light when we swung, being swinging to starboard, and she was still coming closer to us, and somehow she couldn't swing clear, she was keeping on swinging with us, and I didn't know what way she was going; she was coming right after us, came right on for us, like."

The theory of counsel for the appellant from the first has been that the "Gualala", immediately prior to the collision, and at a time when by so doing she made the collision inevitable, suddenly changed her course and attempted to cross the bow of the "Argyll". The testimony of those on board the "Gualala" stands uncontradicted and it is unim-

peached. They had seen the lights of the "Argyll" for at least four minutes prior to the collision and had been vigilantly watching those lights and doing everything which to them seemed possible to enable them to properly direct their course in such a manner as to avoid a collision, and yet appellant would have the court believe that, at a moment when by such action, and only such action, they could have brought about a collision, they suddenly changed the course of the "Gualala" and ran squarely into the path of the approaching "Argyll", and into such a position that not only the safety of their vessel was imperiled, but their lives as well. Even an inexperienced navigator would, we submit, not have taken such a course. The rules of common sense, to say nothing of the rules of navigation, would have been violated to such an extent by so doing that we think the attempt upon the part of the "Argyll" to so explain the collision was seized upon as a desperate chance to throw upon the "Gualala" the responsibility for the loss which, we think, we can demonstrate, was due solely to the flagrant faults of those navigating the "Argyll".

As has been said by the Supreme Court of the United States, in *Haney v. Baltimore Steam Packet Co.,* 23 How. 287; 16 L. Ed. 563; in language which was quoted with approval and followed in *The Luretta Speddin,* 184 Fed. 283, at p. 285:

> "We think the statement of Mr. Justice Grier, speaking for the Supreme Court of the United States, aptly characterizes this defense:

> 'This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false.'
>
> and proceeding further, said:
>
> 'The hypothesis set forth in the answer to excuse this collision, that the boats were passing on parallel lines, 300 yards apart, and that, when within 100 to 150 yards of passing each other, the schooner turned round and ran herself under the bows of the steamer, is not only grossly improbable in itself, but contradicted by the testimony, and is a mathematical impossibility.' "

Our own Circuit Court of Appeals, speaking through Judge Hawley, in *The Dauntless,* 129 Fed. 721, quoted the above language from the Haney case with approval and, upon the same ground, refused to accept a theory that one vessel had turned suddenly across the bow of another as an excuse for the collision.

The last case in which this threadbare excuse has been criticised is that of *The Curtin,* 205 Fed. 989, at page 991.

IF THE "ARGYLL" WAS GUILTY OF A FAULT SUFFICIENT TO ACCOUNT FOR THE COLLISION, SHE MUST PROVE THAT THAT FAULT DID NOT CONTRIBUTE TO THE DISASTER.

The leading case on this point is that of *Belden v. Chase,* 150 U. S. 674; 37 L. Ed. 1218, where the court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony and

> such fault in itself is sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

In slightly different language, the court in *The Oregon,* 158 U. S. 186; 39 L. Ed. 943, at page 949, said:

> "As we had occasion to remark in Alexandre v. Machan, 147 U. S. 85; 37 L. Ed. 90, where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault."

Again, in the case of *The Chicago,* 125 Fed. 712, at page 715, the Circuit Court of Appeals of the Second Circuit, in a collision case, said:

> "This court has repeatedly held, following the Supreme Court, that a vessel which is primarily in fault for a collision cannot shift its consequences in part upon the other vessel without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster. The reckless navigation of the burdened vessel in this case calls for the application of our comments in The Transfer No. 8, 96 Fed. 253, 'The fault of the Waterman is so glaring, and its consequences precipitated a situation involving such difficulties, that we are not inclined to be severely critical of the maneuvers by which the Transfer undertook to escape from it'."

In *The Brittania,* 153 U. S. 130; 38 L. Ed. 660, at page 665, the court quoted the following from *Belden v. Chase, supra:*

> "It is a settled rule in this court that when a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

In *The Victory,* 168 U. S. 412; 42 L. Ed. 519, the court said:

> "As between these vessels, the fault of The Victory being obvious and inexcusable, the evidence to establish fault on the part of The Plymothian must be clear and convincing in order to make a case for apportionment. * * *
>
> The recognized doctrine is thus stated by Mr. Justice Brown in The Umbria, 166 U. S. 404: 'Indeed, so gross was the fault in this connection that we should unhesitatingly apply the rule laid down in The City of New York, 147 U. S. 72, and the Ludwig Holberg, 157 U. S. 60, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

In *The Wm. Chisholm,* 153 Fed. 704, where a collision occurred at night in Lake St. Claire, there was evidence tending to show that signals for passing port to port, in accordance with the rules, were exchanged, although that was in dispute; but it was shown without dispute that when the vessels were some 1500 feet apart and head on, one gave a signal of two blasts, which was assented to, and then the other put her helm hard a-starboard and swung to

port. After so swinging it was shown that the first vessel did not starboard her wheel, and, in holding her liable, for not complying with the passing signal, the court, at page 712, said:

> "We find upon the concurrence of the testimony of both sides that the two vessels were approaching each other head and head, or nearly so, for a length of time before they would meet amply sufficient to make provision for passing. If they continued on such courses, there would be risk of collision. If the Oceanica, before the vessels were laid on these courses, but in anticipation thereof, had given a signal of one blast, as it was her duty to do, and that had been assented to, she had no right to change it, being under no necessity, and the other vessel was bound to assume that they were to pass port to port until the Oceanica gave clear signs that she was not complying with the agreement; if she changed her purpose while they were proceeding end on and blew two blasts, she was bound to proceed accordingly and go out to port. But if, as she claims, she had given a double blast before the vessels came head and head, and had given no other, she was equally bound to go to port for passing, and in either case there was nothing in the conditions which made this dangerous or difficult. Her double blast would mean to the Chisholm, 'I am directing my course to port'. If she was in doubt of the intention of the other vessel, she was bound to give an alarm whistle and check or stop and reverse, if necessary, as required by Rule 26; but, if she gave no notice of any embarrassment, the Chisholm was entitled to assume that she had none, and proceed accordingly. Thus, upon any fairly possible construction of the facts, the Oceanica was grossly at fault. * * * It seems clear that

but for her misconduct the collision would not have happened.

In these circumstances, the Chisholm is entitled to be judged by the rule long followed by the courts of England and of this country that when one vessel, clearly shown to have been guilty of a fault adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can be rebutted only by clear proof of a contributing fault." (Citing a number of cases.)

We have quoted so fully from this case because the points made by the decision are so similar to those we are making in the case at bar. Digressing, for the moment, to one of these other points, after the "Gualala" blew the passing signal of one blast, indicating: "I am directing my course to starboard", and received the assent of the "Argyll" to this course, the "Gualala" had only to direct her course to starboard. As it is put in the Chisholm case: "If she (here the 'Argyll') gave no notice of any embarrassment, the 'Chisholm' (here the 'Gualala') was entitled to assume that she had none, and proceed accordingly."

Returning to the presumption in favor of the "Gualala": In *The Georgetown,* 135 Fed. at page 857 (in this case the "Georgetown" had the other vessel upon her starboard bow), the court said:

"The Georgetown on the occasion in question was the vessel on whom the burden rested to avoid the collision; and she having been found guilty of faults sufficient in themselves to account for the collision, the burden is upon her

> to show that her negligence not only did not probably produce, but could not have contributed to, the collision, and, under these circumstances, cannot escape liability by the suggestion of possible negligence upon the part of the tug and tow. All reasonable doubts as to the vessel at fault must be resolved in favor of the tug and tow, and they held not contributing to the collision unless their negligence is clearly established."

The same rule was followed in *Foster v. Merchants & Miners etc.,* 134 Fed. 964.

In *The Martello,* 153 U. S. 64; 38 L. Ed. 639, at page 641, the court, after stating that the "Willey" was guilty of a statutory fault in having failed to provide herself with a fog horn, as prescribed by the international regulations, and so not having it was unable to give the signal required through such fog horn, said:

> "The presumption is that this fault contributed to the collision. This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship. In the Pennsylvania v. Troop, 86 U. S. 152; 22 L. Ed. 148, it was said that in such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

This rule has been followed so often that it has been spoken of in case after case in the United States Supreme Court.

Commenting upon it in *The Genessee Chief,* 12 How. 443; 13 L. Ed. 1058, at page 1067, the court said:

> "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout besides the helmsman. * * * And whenever a collision happens with a sailing vessel, and it appears that there was no other lookout on board the steamer but the helmsman, or that such lookout was not stationed in a proper place, *or not actually and vigilantly employed in his duty,* it must be regarded as prima facie evidence that it was occasioned by her fault."

In *The Rondane,* 9 Asp. M. C. 109, where a violation of Rule XVI was in question, and where it was claimed that the violation of the rule did not contribute to the collision, the president of the admiralty division said:

> "When a vessel has broken a statutory rule, the onus on those who seek to say it is immaterial is a very considerable one. In this case, one is necessarily cast on a matter of imagination. One has to consider whether it can possibly be the case that the failure of the 'Herman Koeppen' to obey this rule is immaterial. I am not able to come to that conclusion. It is a matter for imagination and no one could possibly say what would have happened if the 'Herman Koeppen' had obeyed that rule. Every one can conjecture what would have happened."

It was put still more strongly in *The Brittania,* 9 Asp. M. C. 67:

> "One must see that the non-stopping could by no possibility have contributed to the collision."

The late Judge De Haven, in this district, in *The Dauntless,* 121 Fed. 420, at page 421 (the decision in the District Court was later affirmed in the Circuit Court of Appeals, from which last mentioned decision we have already quoted), quoted in his decision in that case the principle stated by the Supreme Court in *The Pennsylvania,* 19 Wall. 125; 22 L. Ed. 148, that where a vessel is guilty of the violation of a statutory rule intended to prevent collision,

> "The burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

Judge Hanford, in *The Admiral Cecile,* 134 Fed. 673, at page 678, in commenting upon the rule, said:

> "This was repeated and declared to be the settled rule in collision cases by the Supreme Court in Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S. 422; 33 L. Ed. 398. The same rule was again reiterated in the case of Belden v. Chase, 150 U. S. 699; 37 L. Ed. 1218."

The following cases are all to the same point:

The Pennsylvania, 86 U. S. 19; 22 L. Ed. 148;

Richelieu & O. Nav. Co. v. Boston M. I. Co., 136 U. S. 408; 34 L. Ed. 398;

The Martello, 153 U. S. 74; 38 L. Ed. 641;

Greenwood v. Westport, 60 Fed. 567;

Thomas Towboat Co. v. Central R. Co., 61 Fed. 118;

Flint & P. M. R. Co. v. Marine Ins. Co., 71 Fed. 215;
The Glendale, 81 Fed. 640;
The Livingstone, 87 Fed. 778;
Sounell v. Boston Towboat Co., 89 Fed. 762;
Mexican C. R. Co. v. Jones, 107 Fed. 65;
The Lakine, 118 Fed. 979;
The Admiral Cecile, 134 Fed. 678;
Foster, Master v. Merchants & M. T. Co., 134 Fed. 964;
The Edward Smith, 135 Fed. 35.

It is not possible for the "Argyll" to sustain the burden imposed upon her to show that her faults *might not have been* one of the causes, or that one of them *probably was not* one of the causes, to say nothing of demonstrating that they *could not have been* one of the causes of the collision.

In *Spencer on Collisions,* Sec. 106, the rule is stated:

> "Where a statutory requirement or a precaution demanded by good seamanship has been omitted immediately preceding the collision, and the omission is one well calculated to bring about the same, the law will presume that the collision occurred as a result of such neglect, to remove which presumption the burden of proof is upon the one omitting such precaution or requirement to clearly show that the thing omitted did not contribute to or produce the collision."

In *Marsden on Collisions,* page 471, the author states:

> "If a ship is proved to have been negligent in not keeping a proper lookout she will be

held answerable for all the reasonable consequences of her negligence." * * *

If a vessel violates the rule requiring her to keep a proper lookout, or any one of the specific injunctions of the international rules (unless excused by the emergency rule 27, as to which there is no contention here), and a collision occurs she will be held liable unless she can show that the collision would have occurred even if she had obeyed the rule. The burden is on the "Argyll" to show that not only the failure of the lookout, Hansen, to report (1) the lights of the "Gualala" when they could have first been seen from the "Argyll"; (2) the change in lights upon the approaching "Gualala"; (3) the disappearance of the green light on the "Gualala", and (4) the evident neglect of McAlpine in not watching the "Gualala's" bearing and the "Gualala's" lights, *did not cause* the collision, but that it *could not have contributed to it.*

It will be noted that, according to the principles laid down in the cases already cited, it is not only necessary for the "Argyll" to show that her violation of the rules was not the cause of the collision, but that she must also show that these violations *could by no possibility* have contributed to the collision. We are, for the purpose of this particular phase of the case, taking as true the testimony of McAlpine, and the lookout, Hansen.

From the testimony of the witnesses produced on behalf of the "Argyll", she was guilty of three faults; each one of which was sufficient in and of

itself to account for the disaster. Under the foregoing decisions any one of those faults upon the part of the "Argyll" entitled the libelants to a decree against her for the full amount of the damage caused by the collision, and the court below properly so found.

These several faults were:

I. *Failure to maintain a sufficient lookout.*

II. *Failure to keep out of the way of the "Gualala", she being on the "Argyll's" starboard bow.*

III. *Failure to avoid the "Gualala" after answering her one blast of the whistle.*

I. FAILURE TO MAINTAIN AN EFFICIENT LOOKOUT.

The fault of those on board the "Argyll" in failing to maintain a proper and efficient lookout was so great, and in effect was so disastrous, that an analysis, or subdivision, of this fault evidences that the collision would not have occurred if McAlpine, on the bridge, had seen, or if Hansen, on the forecastle, had reported to him

(a) When the lights of the "Gualala" could first have been seen from the "Argyll";

(b) When the two side lights of the "Gualala" could first have been seen upon the "Argyll";

(c) When the green light of the "Gualala" disappeared from view and the red light remained in sight.

These faults, without any others upon the part of the "Argyll", are sufficient, in our opinion, to put upon her the responsibility for the entire loss sustained through the collision.

Hansen, the lookout (whose duty it was, of course, to report not only when the lights of the "Gualala" could first be seen upon the "Argyll", but also any change in the bearings of those lights, or any change in the lights themselves), through all of the time, from the moment when he did first see the lights of the "Gualala" from the "Argyll" (and at a time when they must have already been observable for several minutes) made, according to McAlpine, only one report to the bridge (Tr. 59).

> "Q. Mr. McAlpine, did the lookout report to you at all as to the lights on the "Gualala" after they had been reported to you on the starboard bow?
>
> A. He reported the green light on the starboard bow.
>
> Q. That was the only report you got from your lookout?
>
> A. Yes, sir."

The lookout, however, testified (Tr. 86) that he made two reports to the officer on the bridge; one, when the masthead light was first seen, and another, when he first saw the green light; but, after testifying that he saw both the red light and the green light together, said (Tr. 86):

> "Q. You made no report about that (seeing both lights together) to the officer on the bridge?

A. No, sir; I did not make no report. I made no report to the officer on the bridge about that.

Q. You did not say anything about that?

A. No, sir.

Q. From then on you did not say anything more about the lights of the 'Gualala'?

A. That is all."

And yet he testified, under oath, before the United States inspectors, at a time when, according to the witness' own testimony, his recollection was clear upon the subject (Tr. 97), that he *did not* see both of those lights together. Whether we take his testimony before the inspectors as the truth, agreeing with that of McAlpine, that both lights of the "Gualala" were not seen from the "Argyll" at any time prior to the collision, or whether we believe his testimony, in this case, that he saw both of those lights together, and then failed to report them to the officer on the bridge, the lookout was equally at fault. He proves, in one breath, his own inefficiency; the lack of care on the part of those in charge of the "Argyll", and the absolute responsibility of those in charge of her for the collision, and the loss thereby suffered.

In a comparatively recent case in the United States Supreme Court, *The Oregon,* 158 U. S. 186; 39 L. Ed. page 948, Mr. Justice Brown said, in commenting upon the necessity for an efficient lookout:

> "It is hardly possible that, in a four-hour watch, the attention of the lookout should not be occasionally diverted from his immediate

duty. Yet the withdrawal of his eye from the course of the vessel, even for the fraction of a minute, may occur at a moment when a light comes in sight, and before this light can be accurately located and provided for, a collision may take place. As was said by Mr. Justice Swayne, in Pentz v. The Ariadne, 80 U S. 13; 20 L. Ed. 542, 'the duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of the vessel with all the property and the lives of all on board. The same consequences may result to the vessel with which his shall collide. In the performance of his duty the law requires indefatigable care and sleepless vigilance.''

In *The Ariadne,* 80 U. S. 13; 20 L. Ed. 542, speaking of the duty of the lookout and the burden upon the vessel shown to have had a poor lookout, the court said:

> "Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.
>
> The district judge was also of opinion that the Clan Mackenzie failed to discharge her whole obligation to the steamer, and should consequently share the loss. In this opinion the circuit judge, with evident hesitation, concurred. As we had occasion to remark in Alexandre v. Machan, 147 U. S. 85; 37 L. Ed. 90, where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, *there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault.*"

In the propeller *Colorado,* 91 U. S. 692; 23 L. Ed. at page 382, Mr. Justice Cliffors said:

> "Lookouts are valueless unless they are properly stationed and vigilantly employed in the performance of their duty; and if not, and in consequence of their neglect, the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guity of violating the rules of navigation. Citing Baker v. The City of New York, 1 Cliff. 84; Whitridge v. Dill, 23 How. 453; The Catherine v. Dickinson, 17 How. 177."

McAlpine testified (Ap. 85) that a steamer's masthead light on a clear night—and this was a clear night—can be seen five miles, and that the lights of the "Gualala" upon this occasion were not seen until the two vessels were within three miles of each other.

Hansen, the lookout, however, testified (Ap. 127) that when he first saw the lights of the "Gualala" from the "Argyll", she was only about three or four ship's lengths away, and yet that the masthead lights of a vessel could be seen about *ten* miles away. Immediately after he had testified that he first saw the lights of the "Gualala" when she was only three or four ship's lengths away, he testified that he *should* have seen the lights about ten miles away. He then reiterated that he saw them first when the vessels were only three or four ship's lengths, or about 1200 feet, apart. It seems to us that this testimony not only proves beyond cavil the inefficiency of this man as a lookout, but also

his absolute untrustworthiness. It is a striking example of what we shall discuss in a later portion of our brief, the unreliability of the testimony introduced on behalf of the "Argyll".

Spencer on Marine Collisions, Sec. 175, referring to the necessity for a vigilant lookout, lays down the rule as follows:

> "Vigilance as well as experience is required of a lookout, and if he is inattentive to his duty it is not a sufficient excuse to say that he was competent to perform the duties required of him when it is shown that the approach of a vessel might have been observed in time to have avoided collision had the lookout been watching. The fact that it was not seen is evidence of such a lack of care as will render the vessel liable. The fact being shown that an approaching vessel was not observed, under circumstances when it could have been seen, the law will presume negligence."

The quotation from Spencer is taken, almost word for word, from Mr. Justice Clifford's opinion in *The Sunnyside,* 1 Otto, 208; 23 L. Ed. 302, at page 306:

> "Vigilance as well as experience is required of a lookout; and, if he is inattentive to his duty, it is no sufficient excuse to say that he was competent to perform the required service. No doubt the bark had a lookout; and the evidence tends to prove that he was competent; but his own testimony shows conclusively that he did not properly perform his duty after the mate came forward and returned. He admits that he could not tell whether, at that time, the steam tug was stationary or in motion; and he must have known that the mate left the fore-

castle and went aft as ignorant upon the subject as he himself was.

Suppose that was so, and there is no apparent reason to doubt it, then it was his plain duty, the moment he ascertained that the lights ahead were stationary, to have reported that fact to the mate as the officer of the deck."

Marsden on Collisions, page 471, states the rule:

"If a ship is proved to have been negligent in not keeping a proper lookout she will be held answerable for all the reasonable consequences of her negligence. * * * The lookout must be vigilant and sufficient according to the exigencies of the case."

The court in *The Michigan,* 63 Fed. 280, at page 288, held a vessel responsible for a collision on account of a defective lookout and, in doing so, said:

"The Michigan was in fault in not *having* had a competent lookout in her bow, close to her stem, diligent in duty, alert to see what was before him, and prompt in reporting in time, the position of the Holland."

In a late case, *The Earl P. Mason,* 195 Fed. at page 863, in holding a steamer liable for a collision, the court said:

"The fault lay with the steamship. It is clear, I think, either that her inexperienced lookout—a seaman who had just been shipped after little inquiry into his very slender qualifications, and was performing the duty of a lookout for the first time in his life—failed in vigilance, or (what is perhaps more likely)

> that she miscalculated the distance between the vessels and got into a fatal position before she realized the situation."

In *The Viola,* 59 Fed. 632, where there was a conflict as to the bearing of two vessels, the "Viola" claimed that the "Monette" was seen upon her port bow. The witnesses for the latter testified that for a considerable period before the collision the green light only of the "Viola" was visible, showing that she was on the "Viola's" starboard bow. It was proved that the "Viola" had not maintained a good lookout, and the court held the "Viola" responsible for the collision and in so doing (page 634) said:

> "The failure of the 'Viola' to notice the 'Monette' until she was so near may well have led to imperfect observation and mistake as to the precise bearing of the 'Monette'. I am constrained to find the latter was in fact on the 'Viola's' starboard bow, and that this mistake led to the collision through the order given to port, instead of to starboard, the 'Viola's' helm. This mistake was so near collision as not to be itself ascribed as a fault; for it was doubtless the effect of the excitement in extremity. But as this arose in consequence of the 'Viola's' fault in not maintaining a good lookout, and not seeing the 'Monette' in time for correct observation of her course, and proper maneuvers, the latter fault precludes the 'Viola' from the defense of error in extremis. The Elizabeth Jones, 112 U. S. 514, 5 Sup. Ct. 468."

Mr. Justice Brown, in *The New York,* 175 U. S. 187; 44 L. Ed. 126, at page 134, said:

> "No reason is given why the signals of the 'Conemaugh' were not heard, and as the 'New York' was not more than a mile distant from her when her first whistle was blown, her inability to hear them is inexplicable, except upon the theory that no sufficient lookout was maintained, or that such lookout did not attend properly to his duties. *Her officers failed conspicuously to see what they ought to have seen, or to hear what they ought to have heard, this, unexplained, is conclusive evidence of a defective lookout.* The Sea Gull, 23 Wall. 165; 23 L. Ed. 90; The James Adger, Fed. Cases No. 7188; The Fanita, Fed. Cases No. 4636; The Sunnyside, 91 U. S. 208; 23 L. Ed. 302; Spencer, Collisions, Sec. 175."

Again, McAlpine testified (Ap. 60):

> "Q. You only know that when the whistle was blown by her you looked up and saw then for the first time the red light?
>
> A. Yes, sir.
>
> (Ap. 61) Q. How many times had you looked at the 'Gualala' between the time you first saw her and this passing signal that you received from her?
>
> A. Every time I crossed the bridge.
>
> Q. How many time did you cross the bridge?
>
> A. The bridge is about forty feet wide, or thereabouts; every time I would walk up to one side I would see her lights.
>
> (Ap. 64) Q. Were you looking at the 'Gualala' when he blew his one whistle?
>
> A. No, sir, I do not remember.
>
> Q. Is it not a fact that you were not looking at her at that time, but that when the whistle

was blown on the 'Gualala' you then looked up and saw this red light?

A. It might be.

(Ap. 65) Q. You did not know when that red light was first observable from the 'Argyll'?

A. No, sir.

The COURT. Is that so?

A. Yes, sir.

Q. As I understand, you do not know how long the red light may have been in view from the 'Argyll' before he blew this whistle?

A. Not accurately."

The lookout on the "Argyll" as well as McAlpine, testified that the first side light that they saw upon the "Gualala" was her green light, and that thereafter they saw her red light; and, since during some portion of the time, both the green light and the red light together must have been observable from the "Argyll", there was a period of time during which those on board the "Argyll" could have seen that the "Gualala" was headed directly towards them. From the testimony, we are unable to tell how long those two lights were visible from the "Argyll". Whatever may be the conclusion as to when risk of collision between those two vessels first became apparent to those on the "Argyll", the moment both those side lights showed to those on board the "Argyll" appropriate action upon her part would have made the collision impossible.

McAlpine testified (Ap. 81):

"Q. And you never saw the red light and the green light of the 'Gualala' at any time together prior to the collision, did you?

A. No, sir.

Q. You say you saw the green light?

(Ap. 82) A. Yes, sir.

Q. And you never prior to the collision saw the two lights together?

A. Yes, sir.

Q. But you did afterwards see a red light?

A. Yes, sir.

Q. Will you tell the court how it was when the 'Gualala' turned so that you lost her green light and picked up her red light, how you did not see the two lights together?

A. *Just at that particular minute I was not looking at the 'Gualala'.*

Q. At that crucial moment, when she changed from the green light to the red light, you were not looking at her; is that the fact?

A. Not looking in that direction.

Q. Then you were not keeping a lookout on her when she turned so as to lose her green light and show her red light, is that the fact?

A. I was not looking at her at that actual moment."

Making his fault still more glaring in that respect; in absolute disregard of good seamanship, and the duty imposed upon an efficient officer in whose charge this steamer was, the mate did not even pay any attention to the bearings or the change in bearings of the "Gualala's" lights. He testified (Ap. 83):

Q. Did you at any time prior to the collision take any particular notice of the bearings, or change in bearings, of the 'Gualala's' light?

A. No, sir.

Q. You did not?

A. No, sir.

Q. And you never at any time saw her masthead light and her two side lights at the same instant?

A. No, sir."

It was as much McAlpine's duty to watch the approaching lights as it was that of Hansen. In commenting upon the action of a mate in a similar situation, in *Mircovich v. The Star of Scotia,* 2 Fed. 578, at page 595, the court said:

> "Taking the evidence of the mate, as a whole, I am far from being satisfied that he kept that careful observation of the light, after he brought it on his port bow, which the situation and his responsibility required. He was not able to give such an intelligible account of its bearing and movements, down to the time the green light appeared again, as he should, and could have done, if he had been observant and alert."

The court used still stronger language in *The Pangussett,* 9 Fed. 109, at page 118:

> "This failure (in directing a course) is primarily to be attributed to a very gross failure of those in charge of her to keep a good lookout. The negligence of the mate in this respect is especially reprehensible. *It is as clearly the duty of the officer of the deck, after a light is reported, to keep it in view and watch its movements,* and the effect of the movements of his own vessel taken with reference to it, as it is of the lookout to see and report a light that comes in view."

We desire to refer to the testimony of two competent ship masters to show what they thought of McAlpine's actions.

Capt. John Rinder (a ship master of 17 years' experience) (Ap. 192-3):

"Q. Captain, do you consider it a proper order to give to a quartermaster at the wheel when a steamer is approaching you upon an opposite course, with her masthead lights showing, and a point or a point and a half on her starboard bow, and apparently one mile to 3 miles away, 'don't let her come any closer'?

A. No.

Q. Did you ever hear of such an order being given to a quartermaster?

A. No.

Q. What would be the effect of such an order?

A. The officer in charge of the ship would not know where the ship was going. He would be leaving it to the quartermaster.

Q. What is the custom at night when the officer on the bridge sees a vessel approaching —a steamer—a mile to 3 miles away, approaching on an opposite course, with reference to walking back and forth across the bridge?

A. As a general rule an officer would stand carefully in one position so as to watch the changing of the bearings of the vessel as they approached one another. That would be an act of caution, it would be an act of caution to do that.

Q. Would you, or not, consider an officer a careful and responsible officer who did other than to watch those lights all the time?

A. I would expect him to watch the lights all the time.

Q. What have you to say with reference to his responsibility when he gives such an order to his quartermaster as to 'don't let her come any closer'?

A. Well, I should not care for him to be an officer with me."

Capt. Lebbeus Curtis (a ship master of between five and six years' experience and during fifteen years from seaman to master) (Ap. 207-8):

> "Q. Captain, in your opinion what should the watch officer on the bridge do with respect to a vessel approaching at night within a mile or two miles, say, whose lights show off his starboard bow within 1½ to 2 points and apparently on about a parallel course, as to watching that vessel?
>
> A. He should watch her very closely.
>
> Q. If those lights upon the approaching vessel showed no change of bearing within a period of a minute or such a matter after they first came in sight, what should the watch officer, in your opinion, do with respect to paying attention to the approaching vessel?
>
> A. He should give it the closest attention.
>
> Q. If those lights subsequently showed any change of bearing, what in your opinion, should he do?
>
> A. Call the master.
>
> Q. Captain, what would you say as to the failure of a bridge officer upon the 'Argyll' at night who had the lights of an approaching vessel upon approximately a parallel course reported to him, and who saw the lights and determined the vessels would pass within a thousand feet of each other, and yet paced back and forth across the bridge of the 'Argyll' and only watched the lights of this approaching vessel when he arrived at the end of the bridge on the starboard side?
>
> A. I should say that he was so lacking in judgment or responsibility of his position that he was not fit to have command of the vessel's bridge."

The foregoing testimony was left in the record with none to controvert it; it was not met and in

view of the authorities already cited it proved those in charge of the "Argyll" guilty of a gross fault, so reprehensible in itself as to put upon her, as it was in the lower court, the loss suffered in the collision.

II. FAILURE TO KEEP OUT OF THE WAY OF THE "GUALALA", HAVING HER ON THE "ARGYLL'S" STARBOARD BOW.

According to the testimony of those on the "Argyll", the lights of the "Gualala" were only seen off their starboard bow. The vessels were undoubtedly upon almost opposite courses, and as there can be no question about the courses, and as the testimony of all of those on board the "Gualala" was that the "Argyll" was almost upon the "Gualala's" port bow, the testimony of those on board one of the vessels is directly contradicted by those on board the other, but, assuming for the purpose of the argument, that those on board the "Argyll" did see the lights of the "Gualala" only on their starboard bow, it was the duty of the "Argyll" to keep out of the way of the "Gualala".

Article 19 of the International Rules is as follows:

> "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other" (U. S. Comp. Stat. 1901, page 2870).

> Article 23. "Every steam vessel which is directed by these rules to keep out of the way of another vessel, shall on approaching her, if

necessary, slacken her speed or stop or reverse" (U. S. Comp. Stat. 1901, page 2870).

According to the testimony of McAlpine and the lookout on the "Argyll", the lights of the "Gualala" were, during all of the time from when they were first observed upon the "Argyll" to the moment of the collision, within 1½ to 2 points upon the starboard bow of the "Argyll". The full compass circle contains thirty-two points. The approaching vessel was, therefore, so nearly dead ahead that her lights from the "Argyll" appeared at a point between from a little over ⅛ to ¼ of the distance from dead ahead to straight abeam, or a line which would have represented the base of a right angled triangle whose other line would have been parallel with the keel of the "Argyll". The slightest consideration of this bearing shows how little the course of the "Argyll" would have had to have been changed during the time which elapsed from the moment when the lights of the "Gualala" first became observable from the decks of the "Argyll" to have put the two vessels beyond the risk of collision. It shows, also, the necessity for a careful observation of the rule laid down in Article 19.

Referring again for a moment to the time that must have elapsed between the moment when both of the side lights of the "Gualala" came into sight of those upon the "Argyll" and the time when the green light went out and the red light remained in sight (during which time McAlpine testified he

was paying no attention to the "Gualala" and his lookout testified that he made no report of seeing the two lights to the officer on the bridge), the probability is that both of these lights on the "Gualala" were in sight for some time. When they both came into sight, it was the duty of the "Argyll", as laid down by Article 23, "to keep out of the way" of the "Gualala", and "if necessary" so to do, to "slacken her speed or stop or reverse".

The decisions we have already cited as to fault, and the presumption as to the cause of collision, where one vessel is shown to have been guilty of such fault, are all applicable to this phase of the case. Even in a case where a violation of this article was proved not to have contributed to the collision but only contributed to the damage, the vessel was held in fault for such violation of the rule. How much stronger is the case at bar, where, from the facts, it is certain that this violation of the rule by the "Argyll" not only contributed to the collision, but with the other faults committed by the "Argyll" actually caused it. In *Marsden on Collisions,* page 430, the author, citing *The Thames and The Lutetia,* 19 App. Cas. 640, 649, states:

> "It appears that neglect to obey Article 23 will cause a ship to be held in fault, as the omission, though it could not have contributed to the collision, might have caused or contributed to the damage."

A case somewhat similar to that of the case at bar is that of *The Dorchester,* reported in 21 Fed. 889. The opinion of the District Court was adopted by the Circuit Court of Appeals as its opinion, in 134 Fed. 1023. The collision occurred at night with the weather clear, as it was in this case. In the course of the opinion, the court said:

> "I think it apparent that the 'Dorchester' was in fault. At the first she had the 'Thornhill' on her starboard side, and was bound to keep out of the way, and to do it in such wise as not to embarrass and confuse the pilot of the other vessel. What she did, apparently, was, when directly ahead of the 'Thornhill', and quite close, she made two changes of course. First she ported, opened up her red light, and showed both her lights nearly directly ahead of the 'Thornhill', leading those on the 'Thornhill to infer that she was changing to starboard intending to pass the 'Thornhill' on the port side. * * * (After a full statement of the testimony and after remarking that when the 'Dorchester' had drawn ahead she exhibited both side lights, the court continued.) This was an indication of the expected change of course. It was a change intended by the navigator of the 'Dorchester' and made in pursuance of his intention to pass the 'Thornhill' port to port, and because, as he testifies, he thought it was his duty to port. The pilot of the 'Thornhill' so understood and answered it, and blew one blast to announce his acceptance, consent and understanding; and in obedience to Rule 1, and to assist in the maneuver, he put her helm to port. Just about this time the 'Dorchester', without any fault on the part of the 'Thornhill', so far as the proofs disclose, saw the 'Thornhill's' green light, and ordered

> the 'Dorchester's' helm hard a'starboard. Why it was the navigator of the 'Dorchester' when he heard the one blast signal from the Thornhill, should have kept his helm hard a'starboard, it is difficult to comprehend. He had just been under a hard a'port helm, and his ship could not have got much swing to the eastward, and it is manifest, as the vessels were so close that the 'Dorchester' could not change back to the starboard, it would be still less possible for the 'Thornhill', which had been all along moving to the eastward. It being the duty of the 'Dorchester', when she showed her lights ahead of the 'Thornhill' to pass to the port, and her navigator having so understood her duty, and intended to perform it, what was the duty of the 'Thornhill'? Clearly, it was her duty to proceed upon the assumption that the 'Dorchester' would do her duty and obey the rule, unless it became reasonably certain that she would not do so. The Delaware, 161 U. S. 459; 40 L. Ed. 771; The America, 37 Fed. 813; The Victory, 168 U. S. 412; 42 L. Ed. 519; The Thingvalla, 48 Fed. 765."

The court held the "Dorchester" in fault for the collision.

In *The Emma Kate Ross,* 46 Fed. 872, a collision case where two vessels were under crossing courses, on a bright moonlight night, each vessel was seen from the other a considerable time before the collision. The red light of the tug was first seen from the steamboat, which was going down stream, and a little later the green light also, when she gave a signal by one blast of her steam whistle and held on her course. The steam tug answered with one blast and did not change her course until too

late to avoid collision. The court held that under the provisions of Rule 19 the steam tug was in fault for not having avoided the collision when she had the steamer on her starboard side.

Another case which lays down the same rule is that of *The Helena,* 36 Fed. 463. Cross libels were filed. The "Helena" claimed that the "O'Neil" (the other vessel) was first observed when about a mile distant and about a point abaft the "Helena's" starboard beam; that the vessels seemed to be gradually approaching, when suddenly, without warning, the "O'Neil" starboarded her helm, and undertook to cross the "Helena's" bow. The court held that the claim of the "Helena" was not well founded and in discussing the situation said:

> "In this situation of the vessels, the duty of the 'Helena' is prescribed by Rule 19 (Rev. St. sec. 4233), 'If two vessels under steam are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way.' * * * Whether her (the 'Helena's') failure to observe the course and situation of the 'O'Neil', and to take proper measures to avoid the collision, resulted from neglect to maintain a proper lookout, or from other cause, need not be determined. It was her duty to keep off; and no justifiable cause for failing to do so being known, she must be held to have been in fault."

RISK OF COLLISION.

In the steering and sailing rules (U. S. Comp. Stat. 1901, page 2869) in the preliminary statement and as a part of the rules, is the following:

ASCERTAINMENT OF RISK OF COLLISION.

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

Article 18. "When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

We are mindful of the fact that McAlpine claimed that there was no risk of collision from the time the lights of the "Gualala" were first seen upon the "Argyll" until he saw the red light of the "Gualala", but *this* was but *his* conclusion. His testimony was (Ap. 60):

"Q. Then I understand she kept on coming towards you and you going towards her; a minute and a half after that, approximately, you heard one blast of her whistle?

A. Yes, sir.

Q. How much did her bearing change?

A. It was still two points on the starboard bow.

Q. In other words, coming up towards you still on your starboard bow?

A. Yes, sir.

Q. And she had only changed her bearing ½ point during that time?

A. Yes, sir."

To appreciate the importance of this testimony, it must be borne in mind that the two vessels were at that time both running at approximately eight knots an hour, or each running approximately 810

feet a minute, making the combined speed of the two vessels 1620 feet each minute. According to McAlpine's testimony there was practically no change in the bearings of the lights of the "Gualala" during any of the time her lights were in sight.

The term "risk of collision", and the rules above referred to, were discussed in *The Philadelphia,* 199 Fed. 299, where, at page 302, the court said:

> "The primary fact to be ascertained from the evidence is whether the tug and schooner were proceeding in such direction as to involve risk of collision.
>
> (1) The expression 'risk of collision' has a different meaning from the expression 'immediate danger', as used in the twenty-seventh article. 'Risk of collision' means 'chance', 'peril', 'hazard', or 'danger of collision' merely, and not immediate danger. The D. S. Gregory and The George Washington, Fed. Cas. No. 4100. 'Risk of collision' means, not merely certainty of collision, if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision whenever it is not clearly safe to go on. The Aurania and the Republic (D. C.), 29 Fed. 98, 123.
>
> In the case of The Milwaukee, Fed. Cas. No. 9626, it is said:
>
> 'Risk of collision begins the very moment when the two vessels have approached so near each other, and upon such courses, that, by departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about. It is true that prima facie each man has a right to assume that the other will obey the law. But

> this does not justify either in shutting his eyes to what the other may actually do, or in omitting to do what he can to avoid an accident made imminent by the acts of the other. I say the right above spoken of is prima facie merely, because it is well known that departure from the law not only may, but does, take place, and often. Risk of collision may be said to begin the moment the two vessels have approached each other so near that a collision might be brought about by such departure, and continues up to the moment when they have so far progressed that no such result can ensue.' "

The court found the "Philadelphia" liable for the collision, on the ground that she had the other vessel upon her starboard bow, making it her duty to keep out of the way.

We contend that even if the "Gualala" were two points on the starboard bow of the "Argyll" there was risk of collision, and, under the rules, the "Argyll" should have ported her helm and gone to starboard. Our contention in this respect is borne out by the rule laid down in *The Odessa,* 4 Asp. Mar. C., 493, 46 L. R. 77. The "Murton" was coming down a straight course about 5 P. M., with a light wind, when the masthead light and green light of a steamer, the "Odessa", were seen at a distance of about a quarter of a mile and bearing about one point upon the starboard bow of the "Murton". The helm of the "Murton" was starboarded a little and she proceeded so as to pass the "Odessa" starboard side to starboard side, but the "Odessa", as she came nearer, shut in her green

light and opened her red light and caused immediate danger of collision. The helm of the "Murton" was put hard a'starboard and her engines set at full speed ahead, but the "Odessa", with her stem, struck the starboard quarter of the "Murton". Whistles were not blown. The rules we have above referred to were commented upon in the decision. The lower court found the "Murton" in fault for directing her course to port instead of to starboard, and the upper court on appeal, in affirming the decision of the lower court, used the following language:

> "It seems to me that in this case we must affirm the decision of the learned judge of the court below. I take that judgment to be, that the position of the vessels, even as given by the witnesses for the 'Murton', was in the opinion of the assessors below such, not that there must have been a collision if they proceeded in the courses they were then upon, but that there would have been risk of collision in this sense, that, if the vessels had kept on, they would have passed so closely to each other that any small obstruction in the river, or slight variation in their course, would have caused a collision. In other words, they were in such a position that, if they had continued their courses, there would have been reasonable risk of a collision. Now, it is said that the vessels were going on nearly parallel courses, and that they were a quarter of a mile off when they saw each other's green light. That is true. But how did each vessel see the green light of the other? Those on board the 'Murton' saw the green light of the 'Odessa', a point on their starboard bow. That might be, although the vessels were not on exactly parallel courses;

but if one vessel was only slightly pointing to the other the two vessels might have crossed one another's course. It is only on the supposition that both vessels would keep on parallel courses that they would pass each other without collision. Mr. Butt says that so long as green light was to green light there would be no danger of a collision; and he says, if we hold to the contrary, that will be making a hard and fast rule. On the contrary, I think that, if we adopted his theory, we should be making a hard and fast rule. Whether there is risk of collision must be a question of fact and skill, to be decided by the learned judge, with the assistance of assessors, on the evidence brought forward. If the vessels had been three or four points off, showing green light to green light, I would say that there was no risk of collision; *but when you come to two points, I do not know exactly what the risk would be.* But when you come to one point, it seems to me, as far as I can understand the matter—and I have heard it very often discussed, and evidence given on the point—that it is very difficult to show that there is not risk of collision. With three points there is hardly any risk, but even then it must depend on the circumstances of the case. The whole question is one of fact; and the whole point to be decided in this case is, whether the vessels were in such a position when they sighted each other that there was a risk of collision. The moment that that question of fact is decided, in all circumstances the rule becomes absolute that the vessels must port their helms. In the present case the 'Murton' starboarded her helm, and the other vessel, the 'Odessa', ported. That being so, I am of the opinion that the decision of the court below must be affirmed."

It will be noted that the court believed that there was *risk of collision* when the lights of the approaching vessel *were a point off the starboard bow;* that *they thought there would be* if they had been *two points off the bow* and even with three points thought there would be hardly any risk of collision, as they put it, still it must depend on the circumstances of the case. That there was risk of collision in this case with the "Gualala's" lights a point and a half or two points off the starboard bow of the "Argyll" is beyond question. It is proved by the fact that the collision occurred.

Another English case, in which the court passed upon the question of risk of collision and what is meant by meeting "end on", is that of *The Earl of Elgin,* 1 Asp. M. S. 150; 4 P. C. 1. The facts in that case were very similar to the facts in the case at bar. A collision occurred between two steamers at 10:30 P. M., on the coast of Yorkshire. The weather was fine and clear, the wind light, the "Jesmond" steering north northwest, making seven or eight knots, when the masthead light and then the side lights of the "Elgin" were made out a distance of a mile and a half ahead. According to the evidence of the second mate of the "Jesmond", the helm of the "Jesmond" was ported and the vessel went off about a point and a half and was then brought back to within half a point of her course. When the vessels were about 300 yards apart the green light of the "Elgin" opened out and the second mate immediately

gave the order "hard a'port" and stopped his engines. About a minute after, the two vessels came into collision. The "Jesmond" struck the "Elgin" on the forward starboard side and she sank. The "Elgin" claimed that she was proceeding at seven or eight knots an hour, that the masthead lights and the green light of the "Jesmond" were seen on the starboard bow of the "Elgin"; that the "Elgin" was kept on her course with a view to pass on the starboard side of the "Jesmond" (just as the "Argyll" did in this case) until the "Jesmond", by porting her helm, opened her red light to the "Elgin", causing danger of an immediate collision, whereupon the helm of the "Elgin" was starboarded. From the evidence of the man on lookout upon the "Elgin", it appeared that he first saw the red light of the "Jesmond" about half a mile off and thereupon the order was given to put the helm hard a'starboard. No one apprehended danger of collision until the "Elgin" starboarded.

The facts in the case at bar seem, on principle, to be almost exactly the same as those in *The Earl of Elgin*. The "Jesmond" was in about the situation in which the "Gualala" was here, and pursued the same course. The "Elgin" was in about the situation the "Argyll" was here, and the officers in charge of her made up their minds that they would pass the other vessel upon their starboard side, just as McAlpine did. For so doing

the court found the "Elgin" liable for the collision, and said:

> "In this case their lordships must hold it has been conclusively found that the two colliding vessels were meeting each other end on, or nearly end on, within the meaning of the 13th sailing rule; that the 'Jesmond', in obedience to the rule, ported her helm—whether enough or not is a question which will be afterwards considered; that the 'Earl of Elgin' violated that rule by starboarding instead of porting, and thereby put herself clearly in the wrong, and became prima facie responsible for the collision which took place."

After discussing a finding of the lower court, that the "Jesmond" should have slackened her speed and reversed, the lower court, upon the point, said:

> "A fortiori, had the 'Earl of Elgin' ported her helm and obeyed the rule, as she was bound to have done, the distance between the two vessels would have been increased, and the collision would have become still more improbable."

The "Elgin" was then held solely responsible for the collision on the grounds stated in the quotation.

The case of *The Wm. Chisholm,* 153 Fed. 704, already cited, is another case in which the court rules upon the duty of a vessel approaching another nearly end on, and in doing so said:

> "We find upon the concurrence of testimony of both sides that the two vessels were approaching each other head and head, or nearly so, for a length of time before they would meet sufficient to make provision for passing. If they continued on such courses, there would

> be risk of collision. If the 'Oceanica', before the vessels were laid on these courses, but in anticipation thereof, had given a signal of one blast, as it was her duty to do, and that had been assented to, she had no right to change it, being under no necessity, and the other vessel was bound to assume that they were to pass port to port until the 'Oceanica' gave her clear signs that she was not complying with the agreement."

In view of the admission in the log of the "Argyll", that after seeing the lights of the "Gualala" the course of the "Argyll" was changed ½ a point to port, and the other extraordinary order which McAlpine testified he gave to the man at the wheel, "Don't let him come any closer"—the meaning of which could only be that he instructed the man at the wheel to keep the lights of the "Gualala" in the same relative position upon the starboard bow of the "Argyll"—which significant combination of facts we have already referred to,—the facts, in the case of *The Livingstone,* 113 Fed. 879, are so unusually similar that we shall quote at length the facts and the decision.

> "When the vessels first sighted each other they were about four miles distant. Their masthead lights were first seen. They were then meeting nearly end on, and rule 17 (which requires that each shall alter her course to starboard so that each shall pass on the port side of the other) became applicable. When about a mile and a half distant the 'Traverse' saw the red and green lights of the 'Livingstone', and blew one blast, as required by rule 23, to indicate that she was going to the right. She ported half a point. This was correct

seamanship. The 'Livingstone' did not answer this signal, and continued on her course. The first mate of the 'Livingstone', who had charge of her navigation at the time, testifies that he did not hear this signal; in fact, no one on the 'Livingstone' heard it, if the testimony of her crew is to be accepted. There is nothing at all improbable in this story. The whistle of the 'Traverse' was clogged with water. Her mate testifies that he blew an unusually long time before he could get a distinct response, and as the wind was blowing the sound directly away from the 'Livingstone' it is not surprising that it was not heard. When the vessels were from three-quarters of a mile to a mile apart, the 'Traverse', seeing at that time only the range and red light of the 'Livingstone', repeated the signal, and again ported half a point. There was no response from the 'Livingstone'. When the distance had been reduced to a quarter of a mile, the 'Traverse' blew a signal of one blast, and ported a third time. This signal was heard by the 'Livingstone' but still there was no answer. Assuming the 'Traverse' to be guilty of all the faults charged against her, what was the situation at the time the third signal was given? The vessels were then about a quarter of a mile apart. Each could be seen by the other without the aid of lights. The 'Livingstone' knew that the 'Traverse' was directing her course to starboard. She knew it from the signal, and it was perfectly obvious without the signal. * * * What then was the manifest duty of the 'Livingstone'? There can be no doubt that she should have ported also. Even had she kept her course, there could have been no danger. There was but one thing possible for the 'Livingstone' to do at this time to bring the boats into collision, namely, to starboard, and that was the one thing she did do. The proof establishes this proposition beyond a doubt. * * *

It was, no doubt, an amazingly stupid piece of navigation, but not unprecedented. Whether the mate called out 'starboard' when he meant to say, and possibly believed he did say, 'port', or whether the wheelsman heard the order 'starboard', and did the opposite, we do not know. Such things have happened before, and an appreciation of the extent of human infirmity, even among men experienced and ordinarily cautious, makes us unwilling to accept the theory of the court below that no navigator could have committed such an error (assuming him to be sane and not intoxicated) unless in some way or other the other vessel misled him. We approach the consideration of the faults charged against the 'Traverse', therefore, without the postulate that an accident of this character, where the one vessel is concededly guilty of such gross fault, 'could hardly have occurred without the concurring carelessness of the other'. On the contrary, we understand the rule as laid down by the Supreme Court to be that where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor. The City of New York, 147 U. S. 72, 85; 37 L. Ed. 84; Ludvig Holberg, 157 U. S. 60, 71; 39 L. Ed. 620; The Umbria, 166 U. S. 404, 409; 41 L. Ed. 1053; The Victory, 16 U. S. 140; 42 L. Ed. 519.

"The district court found that when the vessels were a quarter of a mile apart, and the third whistle of the 'Traverse' was heard on the 'Livingstone', the vessels were in a position of safety, which could be made unsafe

only by the starboarding of the 'Livingstone'. Had the latter ported, or even held her course, there could have been no danger. The vessels would have passed each other with a broad margin of safety. The witnesses from the 'Livingstone' unite in the proposition that the position then was one of safety, though some of them put the 'Traverse' on their starboard instead of their port bow, and one of them, the mate, insisted that he ordered no change of wheel, and that none was made. As before stated, he was discredited by evidence from the deck of his own vessel, the wheelsman testifying that the mate ordered the wheel hard a'starboard; that he put it there, where it remained down to collision; and that the captain, coming on deck, then found it hard a'starboard, which the captain did not deny. The testimony overwhelmingly supports the proposition, stated in the opinion of the district court that 'the "Livingstone" took a sharp swing to port when the last signal was given from the "Traverse" and when, * * * had she held her course or directed it to starboard, the accident would not have occurred. * * * If the "Livingstone" had not starboarded at this supreme moment, she would have passed the "Traverse" without difficulty'. This is the only fault which the district court finds on the part of the 'Livingstone', and, that vessel not having appealed, the accuracy of that finding is conceded. But at the moment the last signal sounded, and before the mate of the 'Livingstone' ordered her wheel hard a'starboard, the vessels were a quarter of a mile apart. He could see the 'Traverse', while her signal notified him as plainly as any light would have done that she was directing her course to starboard. Indeed, when pressed upon cross-examination, this witness admitted that the one whistle heard by him gave him all the informa-

> tion needed, and that the absence of the red light made no difference. Of this statement it is said that it was made by a witness who did not commend himself to the court, and whose narrative in other particulars was found to be untruthful; but the situation itself gives sufficient support to this admission of the mate. Any intelligent man must have known from the whistle in what direction the 'Traverse' was going to swing, and no light was needed to tell him that if he starboarded he would bring his own boat into peril. If failure by the 'Traverse' to display a red light had put the vessels (as a consequence of navigation prior to the sounding of the last signal) 'in a position of danger, where the slightest fault might bring disaster', her failure in that regard might fairly be held to have contributed to the catastrophe. But it must be accepted that the position when the last signal sounded was one of safety, and that peril and disaster came thereafter only as the result of an amazing piece of stupidity in the navigation of the 'Livingstone'."

As a matter of fact the testimony of McAlpine, that he changed the course of the "Argyll" to port, when the lights of the "Gualala" were first seen; the entry to that effect in the log of the "Argyll", and the further fact that he told the man at the wheel not to "let him come any closer" —the last order practically putting the man at the wheel in control of the "Argyll" until the "Gualala" should pass—all furnish, to our minds, an absolute explanation of how the collision occurred. The "Gualala", seeing the lights of the "Argyll" ahead and nearly head on,—as Gibbs put it— "with

her masthead lights nearly in line", indicating that the "Argyll" was coming almost directly towards the "Gualala", the "Gualala" directed her course somewhat to starboard, in accordance with Rule 18, and finally blew a passing signal indicating the change to starboard and her intention to pass the "Argyll" upon her port side. In the meantime, on board the "Argyll", the man at the wheel, doing as he was told, temporarily disregarding the course upon which he was steering (as out in the ocean as they were, miles from land, the loss of time resulting from a temporary change of course occupying no longer than would have been necessary to pass the other vessel and get clear, would mean little), and not allowing the "Gualala" to "come any closer", payed off to port, just as was indicated by the log. The probability is, that instead of paying off only half a point, the helmsman kept on going in that direction in order to keep the lights of the "Gualala" at the same point on his starboard bow —a point and a half or two points, as all of those on board the "Argyll" testified—until, in following up the relative direction in which, upon the opposite course, the "Gualala" was going, McAlpine, who was paying so little attention to the "Gualala" as not to be even looking at her lights (except to look at them after he had paced eighty feet back and forth across his bridge), suddenly realized that he was in a dangerous predicament. Then, when too late to avoid the danger, he suddenly

changed his course, perhaps about the time the captain arrived on the bridge.

Although it does not seem possible that any sane man could have given the order to go to port under the circumstances in which these two vessels were meeting, as was said in *The Livingstone, supra:*

> "It was, no doubt, an amazingly stupid piece of navigation, but not unprecedented. Whether the mate called out 'starboard' when he meant to say, and possibly believed he did say, 'port', or whether the wheelsman heard the order 'starboard' and did the opposite, we do not know. Such things have happened before and an appreciation of the extent of human infirmity, even among men experienced and ordinarily cautious, makes us unwilling to accept the theory of the court below that no navigator could have committed such an error."

Although all of the expert witnesses put on in behalf of the "Argyll" testified that the diagram of Gibbs, showing how, in his opinion, the collision occurred, could not represent what actually happened if the "Argyll" directed her course to starboard, still they all admitted that if the "Argyll" directed her course first to port, instead of to starboard, the collision could have occurred, and the two vessels could have come together at exactly the angle the proofs show them to have impinged upon each other. The proofs that the "Argyll" *did* go to port lie in the entry made in her log that she changed her course one half point to port, and the order McAlpine gave to the man at the wheel, "Don't let him come any closer".

III. FAILURE TO AVOID THE "GUALALA" AFTER ANSWERING HER ONE BLAST OF THE WHISTLE.

The "Gualala" had a right to assume that when the "Argyll" answered her one blast of the whistle that the "Argyll" would go to starboard. We are fortunate in being able to sustain our position as to each of the points we have made against the "Argyll" by citations from the Supreme Court of the United States. We feel that we might almost submit this case to the court upon one citation, that of *Belden v. Chase,* 150 U. S. 674; 37 L. Ed. 1218.

The action was commenced in the state court, tried before a jury and carried to the Supreme Court of the United States.

We quote from the head note of the decision:

> "Where two steamers are meeting end on, or nearly so, if the pilot of either blows a single whistle,—the signal of passing to the right,—and the other steamer answers by a single whistle; each steamer is bound to pass to its own right; and if afterwards one of the steamers changes the course by blowing two whistles, they must be given in time to enable the steamers to change their course and to pass safely to the left, or the steamer giving the two whistles is guilty of negligence if a collision thereby occurs."

And from the decision itself at page 1228 of 37 L. Ed:

> "At this point (a quarter of a mile from the point of collision) the pilot of the 'Yosemite' gave a short and distinct blast from his whistle

> as required by law, as a signal of his intention to pass to the port side of the 'Vanderbilt', and this the pilot of the 'Vanderbilt' answered by a similar blast, *whereupon under the rules it became imperative for the steamers to pass to the port side of each other. The 'Vanderbilt' was bound to go to the right after the bargain was made by the exchange of single whistles;* but instead of doing this, and immediately after, the 'Vanderbilt's' pilot gave two whistles, which it is claimed on behalf of the plaintiff were answered by the whistles from the yacht. This is denied by the latter; and even if true, an assent to the 'Vanderbilt's' change was at the latter's risk. The 'Vanderbilt's' pilot on the instant sheered his boat to port, then slowed, and the collision occurred, the 'Vanderbilt' being struck nearly at right angles."

Apparently, the only difference between the facts in the "Vanderbilt" case and those in the case at bar is that the "Argyll" claims to have blown three whistles, instead of two, after having answered the one whistle from the "Gualala".

Another case to the same point is that of *Lake Erie Transp. Co. v. Gilchrist Transp. Co.,* 142 Fed. 89, where two vessels when a mile or so apart exchanged passing signals of one blast. The night was clear but the vessels struck each other at an angle of from 1½ to 2½ points. In holding one of the vessels responsible for the collision the court said:

> "Risk of collision was not involved if each did what it was bound to do under the usage of navigation and particularly under the port

to port agreement. The Victory, 168 U. S. 410, 420, 18 Sup. Ct. 149, 42 L. Ed. 519; The Waldo, 100 Fed. 502, 40 C. C. A. 517. * * *

"The 'Rome' was not bound to anticipate that the 'Mack' would not act lawfully and comply with her agreement, and so long as there was apparent reasonable opportunity for her to swing and clear the 'Rome' the latter might assume that she would do so. This is the doctrine as we read and construe the cases of The Free State, 91 U. S. 200, 205; 23 L. Ed. 299; The Servia, 149 U. S. 144, 154; 37 L. Ed. 681; The New York, 147 U. S. 72; 37 L. Ed. 84; The Victory v. The Plymothian, 168 U. S. 410, 427; 42 L. Ed. 519, and the case of The Elphicke, 123 Fed. 405, 407, a case decided by this court, the opinion being by Judge Severns. Neither was the 'Rome' required to consider the possibility that the 'Mack' would be unable to comply with her agreement or that she would, through negligence, persist too long in her original course.

"Within the meaning of the rule, 'risk of collision' is not constituted when by compliance with a passing agreement they can certainly pass in safety and each vessel may be navigated upon this supposition until the intervention of something which should operate as notice to an officer of skill and prudence of the presence of danger."

Another case to the same point is that of *Ohio Transp. Co. v. Davidson S. S. Co.,* 148 Fed. 185, where a collision was held solely due to the fault of one vessel in failing to conform to a passing agreement. One of the vessels signalled the other when about ¾ of a mile away. The signal was answered and accepted and in that case, as in this,

the answering vessel attempted to excuse the subsequent collision by claiming that the signal was not sounded until the vessels were so close to each other (oddly enough in that case the witnesses for the vessel in the situation of the "Argyll" also claimed the other vessel was within three lengths of her) that she could do nothing but accept the proffered passing arrangement. The court dismissed this claim with the remark that it regarded it "as a substantial confession of most palpable negligence".

In a very early case, *The Edwin H. Webster,* 18 Fed. 724, where two steam tugs had exchanged mutual assenting signals as to the mode in which they would pass each other, and a collision ensued, and the libelant's tug had the other on her own starboard hand, the court held that the burden of proof was upon the libelant to show by a reasonable preponderance of evidence that the respondent's tug was in fault, and the libel was dismissed.

A case often quoted with approval and one in which a careful review of the evidence is had, is that of *The F. W. Wheeler,* 78 Fed. 624, where a vessel answering a passing signal of one blast claimed afterwards to have been aground. Here the "Argyll" claims that when she answered the passing signal of one blast she was either so far to the starboard of the "Gualala", or so close in front of her, as to make the suggested maneuver

out of the question. The court in the Wheeler case, discussing the excuse, said:

> "It was clearly a fault on her part to accept that signal and give her answer to assure the 'Chamberlain' that she was under command. We are strongly disposed to agree to that conclusion upon the circumstances of this case (just as it would seem to us we have the right to assume that the 'Argyll' when it answered our passing signal was in a position where she believed the maneuver was a proper one and that the two vessels could pass each other port to port). * * * The single blast was a proposition to pass port to port and was a proper signal for these vessels, being 'head on', or 'nearly head on'. * * * The establishment of an agreement to pass port to port, which was clearly the proper proposition under Rule 18, and under the supervising inspectors' rule above referred to, for the 'Chamberlain' to propose, placed each vessel under the equal obligation of keeping to the port of the other. The 'Chamberlain' was under no higher obligation to go to the westward of the 'Wheeler' far enough to pass her at a safe distance, than was the 'Wheeler' to go to the eastward far enough to pass the 'Chamberlain' safely. * * * The improbability that an experienced and expert navigator would have invited the 'Chamberlain' to continue on a course which would enable her to pass the 'Wheeler' at a safe distance, but which, if so, would inevitably bring her in collision with the 'Ashland' (the 'Wheeler's' tow), is so great as to lead us to doubt the reliability of the evidence relied upon to show that neither the 'Wheeler' nor 'Ashland' was under headway or control when signalled by the 'Chamberlain'."

The rule that if two vessels are meeting end on, or nearly so, so as to involve risk of collision, the

helms of both should be put to port so that each may pass on the port side of the other has been laid down in *The Nichols,* 7 Wall. 656; 19 L. Ed. 157; *The Annie Lindsley,* 104 U. S. 185; 26 L. Ed. 716; *The Maggie J. Smith,* 123 U. S. 353; 31 L. Ed. 178; *The Nacoochee,* 137 U. S. 341; 34 L. Ed. 691; *The Blue Jacket,* 144 U. S. 39, 36 L. Ed. 478.

In *The Nichols, supra,* it was held that a vessel which, meeting another end on, puts her helm to starboard and is run down and sunk by the other vessel has no claim on her for damages.

PRESUMPTION IN FAVOR OF THE "GUALALA" BY REASON OF

(1) Contradictory testimony of members of crew of "Argyll".

(2) Condition of "Argyll's" log.

The testimony of those in charge of the "Argyll" could hardly have been more contradictory. That of McAlpine particularly so.

The court below was, we think, convinced of the absolute unreliability of the testimony of this witness, McAlpine. He contradicted himself over and over again.

He testified (Ap. 68) that his course prior to the collision was northwest, ½ west, and that he continued on this course until after the passing signal given by the "Gualala" was answered by the "Argyll", when he changed his course to hard

a'port; that no other change of course was made by the "Argyll" prior to the collision. Later (Ap. 79) he testified (after saying that to order his wheelsman not to "let her come any closer" is not considered a change of course);

> "Q. But you did change her course?
> A. Yes, sir. I spoke to the wheelman, I said, 'Do you see that fellow, Andrew?' He said, 'Yes'. I said, 'Don't let him come any closer'."

He testified at one time (Ap. 70) that the collision had occurred by the time the captain arrived on the bridge. His attention was then called to his testimony, given under oath before the United States Inspectors, in which he said that the captain asked him when he came upon the bridge, "Where is that fellow?" and he answered, "He is on our starboard bow", and the other statement before the inspectors that the "Gualala" was a ship's length away by the time the captain had arrived upon the bridge. Changing his testimony again, he said, the captain *was* on the bridge at the time of the impact.

He contradicted himself three times about the distance the "Gualala" was away when he first saw her. He first testified (Ap. 53), "When I first saw the 'Gualala', she was then about inside a mile away." Before the inspectors (Ap. 57), a month and a half after the collision, he testified that when he first saw her she was about three miles away. When pressed for an answer as to which was correct (Ap. 57) he said, "If I said it was three miles

it might have been three miles; it might have been two miles. I say a mile and a half now, and mile and a half is what I say now."

Again (Ap. 62)—still attempting to explain why he had testified before the inspectors—

> "Q. How far away was she when you first saw her, when the lookout reported her?
> A. Perhaps half a mile."

he saw no other way out of his difficulty than to testify:

> "I think you had better take the mesne of all those, I am not absolutely certain whether she was three miles, or half a mile or a mile and a half."

As to when the red light on the "Gualala" first showed, he testified first (Ap. 60), that the red light did not show before the "Gualala" blew one whistle. Then, when questioned closely about it, he modified his statement (Ap. 61) and testified that the one whistle called his attention to the "Gualala" and *then* he saw her red light for the first time.

He also testified (Ap. 66) that the "Argyll's" course was not altered ½ a point to port, but this was contradicted by the entry in the log "Altered course ½ point to port. Received one whistle from vessel", and he finally explained (Ap. 79) that the "Argyll' may have swung ¼ to ½ a point; that he did not consider that a change in course.

He was on the same vessel for two or three months with the captain who wrote in the log book

during that time, and still he would have us believe that he not only could not recognize the captain's handwriting (Ap. 66), but did not know the first mate's or the second mate's, both of whom wrote up their watches on the bridge in the same log book he wrote his.

He testified (Ap. 47) that he answered the "Gualala's" whistle with one from the "Argyll", and (Ap. 77) that he blew three whistles to show he was going backwards. Then, when asked whether he blew an alarm signal, he said that he blew four whistles. When squarely asked "Did you ever blow an alarm signal?", he replied "No, sir." When his attention was called to the report made to the United States inspectors, "I ordered my helm to port, answering his signal and seeing we were in close proximity, gave three whistles and went full astern with engines. I then gave the danger signal of four whistles, the other vessel being in such a position that I considered we were unlikely to pass clear," he said that he remembered making the report, and that if he stated there that he blew it (meaning the alarm signal of four whistles) that he did blow them. No one else testified that four whistles were blown. No one else heard them and, of course, they were *not* blown.

His testimony before the United States inspectors, taken within a month and a half after the collision was, as to many points, absolutely at variance with his testimony given before the court. His

manner when he attempted to explain away these contradictions, carried with it either one of two conclusions; the man's recollection was so vague that he actually did not remember the circumstances of the collision, or he was wilfully refraining from telling the truth. We are not charitable enough to believe that the explanation lies in the first of these, even though his testimony was given a year after the collision.

The testimony of Gibbs, the man at the wheel, and the lookout upon the "Gualala" were all taken within a few weeks after the collision and while the facts were all fresh and clear in their minds. Their stories are absolutely straightforward and their testimony bears every indication of honesty and truthfulness.

We feel that we come clearly within the language of the court in *The Eagle Wing,* 135 Fed. 826, where, in speaking of the weight that should be given to the testimony of the respective parties to the action, the court said:

> "Where the testimony in behalf of vessels in collision is conflicting and uncertain as to what was done upon one vessel, and the testimony on behalf of the other vessel as to what was done is clear and positive, or where the testimony of one of the vessels comes from intelligent, experienced, and apparently reliable witnesses, and that of the other from ignorant, inexperienced, shiftless, and manifestly unreliable persons, the court in admiralty, as in all other classes of litigation, must take into account the existence of such conditions in fixing the re-

> sponsibility for the collision. In the case of the Genevieve and The Vuncan (D. C.), 96 Fed. 859, affirmed 106 Fed. 989, 46 C. C. A. 87, it was said, in determining a conflict of testimony as to which of two vessels was in fault for a collision, that the probabilities and presumptions based upon skill, knowledge, and ability of the crews of the respective vessels, which was the best man, and the least likely to make a mistake should be taken into consideration by the Court. The Alabama (D. C.), 17 Fed. 847; The Mary Manning, 98 Fed. 1000, 39 C. C. A. 377; The Livingstone, 113 Fed. 879, 51 C. C. A. 560; The Hartford (D. C.), 125 Fed. 559."

At the time McAlpine testified under oath before the inspectors he told one story; before the court he told another. Discrepancy after discrepancy was pointed out to him upon cross-examination and his manner upon the stand was enough to discredit him without the differences called to his attention. Distances, time and actions were all mixed up in one confused jumble of uncertainty. We felt justified in asking the lower court to reject his testimony *in toto,* and from the findings of fact in the opinion of the court below, it is apparent that court did so.

> "The cardinal rule, which has served in all ages, and been applied to all conditions of men, is that a witness wilfully falsifying the truth in one particular, when upon oath, ought never to be believed upon the strength of his own testimony, whatever he may assert."
>
> Judge Betts in *U. S. v. Osgood,* 27 F. C. No. 15, 971a.

The testimony of Gibbs, the officer in charge of the "Gualala", on the other hand, was clear and

convincing, and further than that was corroborated by the testimony of both of the men on the deck of the "Gualala" immediately prior to the collision.

The credibility of the testimony of Capt. Dickson was questionable in several particulars. He certainly made different statements at different times as to where he was and what he was doing when he heard the passing signals exchanged between the two vessels. His admissions the day after the collision as to what he did and what he said when he rushed to the bridge of the "Argyll", immediately prior to the collision, as testified to by Latz, Abrahamsen and Stack, were denied by him, but his own first officer said that when he arrived upon the bridge he said "Where is that fellow?" and the mate said he was answered "There, on our starboard bow." The captain, on the contrary, denied having said a word until after the collision. If his testimony given at the trial could be believed, he heard the passing signals exchanged between the two vessels, hurried to the bridge, saw the other vessel directly in front of the "Argyll" and in such a position that collision was inevitable, and yet stood mute without attempting to take any action to lessen the effect of the collision. It is beyond the bounds of reason that the captain of a ship would go upon his bridge and see his vessel about to run down another and yet stand mute.

Konstant Latz (Ap. p. 146), when asked whether, after the collision he heard Captain Dickson say anything about how the collision occurred, testified:

"The captain of the 'Argyll' had been explaining how the collision was. I could not remember very much because I was full of pain, but I remember one thing, he told the quartermaster to put the wheel hard to starboard. This is all I remember. I am sure of that."

Jacob Stack, who was present in the captain's room upon the "Argyll" while they were putting hot towels upon the legs of the injured men, testified (Ap. 198):

"Q. Did you upon the occasion to which you have referred, when the captain of the 'Argyll' was in his cabin, hear the captain of the 'Argyll' say, 'I never had such an accident in my life, this is the first time. I was awake in bed and got up and went to the galley to get a cup of coffee and I heard the whistle, and then I went up on the bridge and sung out 'put your wheel hard a-starboard'?

A. Yes, sir, that is what he said."

Aslak Abrahamsen, one of the injured men, testified (Ap. 202) that he sent for the captain of the "Argyll" to see "if he had some medicine that could in some way lessen pain" (as he put it), and then said that the captain came in and stood and looked at him for quite a while and that then the captain said:

"I have been going to sea for 32 years and I never had an accident in all my life. * * * While I was washing out the cup, I heard one whistle blow and I ran on the bridge as quick as I could and I seen a light a little on our starboard bow, and I told the man at the wheel 'hard a'starboard' and then I seen it was too late, and I hooked her up full speed astern."

In this explanation of Captain Dickson's, not a word is said about *three* whistles. He heard *one* whistle, ran up to the bridge and not until after he had ordered the wheel hard a'starboard were the engines ordered astern; and even then he said nothing about three whistles having been blown to indicate his action in ordering his engines astern. The log book was also silent as to the *three* whistles.

> "When collisions at sea take place open to the view of all parties, and become afterwards subjects of litigation, courts look carefully at the first version given of the transaction by the parties concerned, and distrust all additions to, or abstractions from the original representations, particularly when made under oath."
>
> Judge Betts in *Wells v. The Annie Caroline,* 29 F. C. 17,389a.

In *The George Shiras,* 61 Fed. 300, 307 (C. C. A., 3rd Circuit), the court said:

> "It is very significant that the revised explanations of the accident are given fully two years after it occurred. The damaging admissions were made on the very day it happened, when all the incidents were fresh, and the causes which operated to produce it would have been perfectly well known and understood."

Statements made by any witness, when the facts must have been fresh in his mind, will discredit his subsequent testimony to the contrary.

Moore on Facts, Secs. 752, 757.

In *The Sea Breeze,* 21 F. C. No. 12,572a, declarations of the master, made at various times, and

inconsistent with his testimony, were shown. The court said:

> "The court is well aware that, in admiralty, the admissions of the crews of the respective vessels are not of the most satisfactory and reliable nature; but, in the present instance, they are shown to have been made by an intelligent shipmaster, who was also a part owner of his vessel; and they relate to his own conduct at the time of the disaster."

And the court used these conflicting admissions to impeach his testimony.

The application of the principle:

"Falsus in uno, falsus in omnibus" should be made to the testimony of both McAlpine and Captain Dickson.

CONDITION OF THE "ARGYLL'S" LOG.

The "Argyll" lays great stress upon her claim that the "Gualala" suddenly changed her course and ran across the bows of the "Argyll'. This claim was not made immediately after the collision but was apparently an afterthought upon the part of those responsible for the "Argyll". When they took time to consider how they could put the blame for the collision upon the "Gualala", it occurred to them that they might do so in this way. The old "stereotyped excuse", as some of the courts put it, was not thought of at the time of the collision; nor when the log was written up; nor even the day after, upon their arrival in San Francisco, and

when (Ap. 210), (after consultation with Mr. Tubby, the manager of the marine department, and Captain Ferris, the superintendent), Captain Dickson came hurriedly below to where Captain Lebbens Curtis was making a copy of the log, and waited impatiently for the log so that it might be gone over again and have added to it: "Answered with one blast, gave three blasts, helm hard to port."

As was said in *Pennell v. United States,* 162 Fed. 64, at p. 70:

> "It may further be said, with reference to the omission in the steamer's log in this case, that the log is very complete and full, and the court cannot escape the conclusion that, while the log recites in detail so many things in regard to all the matters relating to the disaster, it would not have been likely to remain silent about so material a circumstance as the fact that the brig was going at an immoderate rate of speed."

Is it conceivable that if the "Gualala" *had* suddenly changed her helm and run squarely across the bows of the "Argyll" neither the mate nor the captain, both of whom were on deck, would have written up their log without mentioning it?

> "In every case of collision between ships in which the testimony of one vessel is as unanimous and positive as it is in this, if it nevertheless be in fact false, there is sure to be some physical circumstance, condition of things or occurrence developed in the evidence to refute and discredit the false testimony."
>
> *The Lepanto,* 50 Fed. 234.

We have more than one physical circumstance, and condition of things here to brand McAlpine's testimony as false, but if *the* cause of the collision was the fact that the "Gualala" ran across the bows of the "Argyll", it is hardly possible that neither Captain Dickson nor McAlpine would have so conspicuously failed to give this as the cause in their narration in the log of how the collision happened.

The court in *The Etruria,* 147 Fed. 216, at p. 217, in somewhat similar circumstances said:

> "According to her answer the weather was 'thick and foggy'. After the original entry of the collision was made her log was interlined to show that it was foggy at that time. The absence of such an entry originally is a suspicious circumstance."

In *The Richmond,* 114 Fed. 212, in language that, if the court had commented upon the defense here, instead of lights as there, would fit the circumstances of this case, exactly, said:

> "A most significant circumstance, bearing upon the vessel's lights, is the fact that, although the failure of the vessel in this regard is made the chief basis of the steamer's defense, the fact that such lights did not exist was not made record of at the time of the collision, either in the steamer's log, or in the protest made next day. Both the log and the protest utterly fail to make any reference to such conditions, and it is hard to believe that so important an omission would have been made had the lights not been burning. Nothing could have been more material to the steamer, —nothing would have so likely accounted for

> the collision, and probably have vindicated the steamer. (Cases cited.) The object of keeping the log was to have a record made at the time of the then existing facts. The Newfoundland, 89 Fed. 510."

The major portion of appellant's brief contains a discussion of the elaborate diagram drawn by Gibbs, under the skilful cross-examination of Mr. Campbell, and a discussion of the expert testimony offered by appellant. The diagram of Gibbs, however, as well as the other diagrams referred to in the brief, were drawn upon a basis of time, courses and distances dependent almost entirely upon estimates. As put by the lower court in its opinion (Ap. 368):

> "Much expert testimony was introduced to show that the collision could not have occurred in the manner testified to by Gibbs, but the value of this testimony depends upon the accuracy of estimates of time, courses and distances. Such estimates are of necessity more or less uncertain."

The opinion of the district judge expresses in his language the rule which has been repeatedly followed in the Federal Courts in admiralty cases. One of the earliest of these cases, *The Argus,* Fed. Cas. No. 521, lays down the rule, as follows:

> "It is proper to observe, that the estimate or judgment of witnesses, as to the bearings, distances or relative positions of objects on the water looked at in the night time, and particularly when the witnesses are placed on vessels in motion, cannot be considered entitled to confidence as facts. They are little more than con-

jectures, formed in a state of mind and position disabling the witnesses from speaking with any reliable certainty."

In *The Narragansett,* Fed. Cas. No. 10,019, one of the parties attempted to demonstrate, as the appellant did in the case at bar, that the collision could not have happened if the testimony of the witnesses were true. The court, in passing on this, used the following language:

> "Various diagrams have been exhibited, and computations of bearings and distances have been made, to demonstrate that the vessels could not have been brought in contact under the relative speed and bearings, if, according to the rule of evidence, greatest credit is given to the outnumbering witnesses on the side of the claimants, in those particulars, in which the two classes differ. I confess I place slender confidence in this description of proof. The inferences from it depend wholly upon the accuracy of the elements on which the computation is made, and a mis-estimate in trivial particulars of the courses, or distances, or speed of the two vessels, would take away all value from the hypotheses and calculations upon which the plans are based."

Again, in *Kelley v. Thompson,* Fed. Cas. No. 4056, the court said:

> "Some gentlemen of nautical experience have given it as their opinion, that if the vessels were meeting in the direction and at the distance supposed, and the libelants changed their course as they say they did, the vessels could not have come together if the D. P. had ported her helm. But the value of such an opinion depends upon so nice a calculation of the times, courses and distances that I should not feel safe

> in adopting it against the clear weight of the direct testimony of eye witnesses. One of the experts said that a variation of half a point in the course of either schooner would make the difference between clearing and not clearing."

In *The John Craig,* 66 Fed. 596, the court held that in nice calculations, based upon the assumed positions of vessels just before collision, an error of a few feet in regard thereto would destroy the most plausible reasoning.

We are content to submit the case upon the main issues, without attempting to distinguish, which of the experts may have been correct as to the possibility, or impossibility, of the collision under their respective theories as to how the collision actually occurred. There was a collision. The lower court, in the findings of fact made after a careful analysis of the weight of the testimony of the witnesses offered by the respective parties, with full opportunity to judge which of those witnesses should be deemed worthy of belief, concluded that that collision "could not have occurred" but for the negligence of the lookout and deck-officer upon the "Argyll".

We respectfully submit that the decree of the lower court should be affirmed.

Dated, San Francisco,
November 7, 1914.

Respectfully submitted,
IRA S. LILLICK,
L. A. REDMAN,
Proctors for The Gualala Steamship Company.